76-481

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. ———

DUKE CITY LUMBER CO., *et al.*,
Petitioners,

v.

EARL BUTZ, Secretary of Agriculture, *et al.*,
Respondents,

and

BENNETT LUMBER PRODUCTS, INC., *et al.*,
Intervening Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The petitioners, Duke City Lumber Company, *et al.*, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is unreported and is re-

produced as Appendix A. The opinion of the United States District Court for the District of Columbia is reported at 382 F. Supp. 362 (1974) and is reproduced as Appendix B.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 1976. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the "Federal Timber Sales Set-Aside Program", adopted by joint action of the Small Business Administration and the Department of Agriculture, which program (a) makes mandatory allocations of federal timber sales to a select segment of the forest products industry, (b) freezes industry structure in perpetuity, and (c) discourages and stifles natural economic growth, is in excess of statutory authority.

2. Whether agency adoption of a new and significantly revised Federal Timber Sales Set-Aside Program can validly be taken where the agencies made no factual investigations or studies, developed no factual record support for the action, and established no rational basis for the action.

3. Whether the administrative due process rights of petitioners were violated where APA rulemaking requirements were not followed notwithstanding (a) the national importance of the issues under consideration, and (b) that at least one of the defendants had determined that its proceedings would be conducted in accordance with the APA.

STATUTE INVOLVED

The principal statute in question is Section 2[15] of the Small Business Act, 15 U.S.C. § 644:

> To effectuate the purposes of this chapter, small-business concerns within the meaning of this chapter shall receive any award or contract or any part thereof, and be awarded any contract for the sale of Government property, as to which it is determined by the Administration and the contracting procurement or disposal agency (1) to be in the interest of maintaining or mobilizing the Nation's full productive capacity, (2) to be in the interest of war or national defense programs, (3) to be in the interest of assuring that a fair proportion of the total purchases and contracts for property and services for the Government are (sic) placed with small-business concerns, or (4) to be in the interest of assuring that a fair proportion of the total sales of Government property be made to small-business concerns; but nothing contained in this chapter shall be construed to change any preferences of priorities established by law with respect to the sale of electrical power or other property by the Government or any agency thereof. These determinations may be made for individual awards or contracts or for classes of awards or contracts. Whenever the Administration and the contracting procurement agency fail to agree, the matter shall be submitted for determination to the Secretary or the head of the appropriate department or agency by the Administrator.

STATEMENT OF THE CASE

Petitioners are 11 companies in the forest products maufacturing industry[1] who brought this suit against the Secretary of Agriculture, the Small Business Administrator, and the Chief of the Forest Service[2] to chal-

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[1] The petitioners are listed in Appendix C. Petitioners are representative of that 4-5% of forest products manufacturers who are being increasingly foreclosed from the timber resource of the national forests because of their employee size.

[2] After the filing of suit, several groups of parties intervened as defendants. These parties are listed in Appendix D. The govern-

lenge certain administrative action taken jointly by the Department of Agriculture (Forest Service) and the Small Business Administration (SBA) and evidenced by an Inter-Agency Agreement signed by them on December 29, 1971, and Paragraphs 2431.11 through 2431.19 of the Forest Service Manual.[3] The administrative action under review is the "National Forest Timber Sales Set-Aside Program" which provides that a certain percentage of national forest timber sales shall be guaranteed to firms classified as "small businesses." Petitioners are classified as "large businesses" under the program since they exceed the small business size standard of 500 employees.[4] The program was purportedly adopted pursuant to the authority of the Small Business Act, 15 U.S.C. §§ 631 *et seq.* Petitioners contended that the administrative action taken had insufficient legal and no factual basis, exceeded the authority of the Small Business Act and other statutes and was adopted in violation of the Administrative Procedure Act's (APA) rulemaking requirements and in derogation of procedural due process rights of petitioners.

A. The Former Set-Aside Program

In 1958, the Small Business Act was amended to provide authority in the SBA to assure that a "fair proportion" of government sales be made to small business enterprises. *See* 15 U.S.C. § 644. Pursuant to that authority, the SBA entered into an agreement with the Department of Agriculture (Forest Service) on December

mental defendants will be referred to herein simply as "defendants," while the intervening defendants will be referred to as "intervenors".

[3] These Manual sections are reproduced as Appendix E.

[4] The measurement counts the number of persons employed by a business entity without regard to the number employed in activities unrelated to the forest products industry or employed at any one installation.

2, 1958, to establish a "set-aside" program for the sale of national forest timber. Under the "set-aside" concept, certain sales of national forest timber were reserved for small business bidding exclusively and forest products manufacturing businesses which did not come within the definition of "small business" were precluded from bidding thereon.

The 1958 set-aside program (hereinafter referred to as "old set-aside program") was premised upon a concept of "need", *i.e.*, set-aside sales were programmed when there was a demonstrated need of small business for such sales. Procedurally, a request would be made of the Forest Service by either the SBA (on behalf of small business) or by small businesses directly for a set-aside sale. A determination would then be made by the Forest Service as to whether set-aside sales were justified under the circumstances and were otherwise compatible with the proper administration of the national forests.

B. Adoption of the Current Set-Aside Program

In 1969, small business interests began importuning the SBA and the Forest Service for extensive revision of the set-aside program. In response to this pressure and unbeknownst to petitioners, the SBA and the Forest Service held confidential discussions among themselves and with representatives of small businesses in the forest products manufacturing industry regarding the formulation of a new program. Notice of the proposed program first came to the attention of the larger businesses who would be discriminated against by operation of the proposed new program on February 15, 1971, when the National Forest Products Association (NFPA), a trade association, was asked by the Forest Service to schedule informal meetings at which the proposed program could be discussed. There was no Federal Register notice of the proposed program or of the scheduled meetings.

Three informal meetings with industry representatives were held under the auspices of the NFPA at which the proposed set-aside program was discussed, along with several other subjects. In May 1971, some of the petitioners and other companies requested a meeting with the Forest Service and SBA prior to any final decision on the matter so that they could make known the real and serious deficiencies in the proposed program and the devastating effects it would have upon them. The Forest Service and SBA agreed to meet with the companies' representatives on July 28, 1971. Unbeknownst to petitioners, the defendants had already commenced implementation of the program prior to the meeting.

The premise asserted by the defendants for adoption of the new program was that it was needed to retard the decline in the number of small businesses in the industry, allegedly at the hands of their "large business" competitors. Although the Forest Service and the SBA maintained that this decline was due to the inability of small businesses to purchase sufficient quantities of federal timber in competition with large businesses, the officials of those agencies admitted they made no studies or other investigations to determine the correctness of this premise. They recognized the existence of other factors which may well have caused a decline in the number of small business sawmills, but rejected petitioners' request that a three- to six-month factual study be undertaken to verify the hypothesis upon which the new program was allegedly founded.

The SBA issued a press release on August 19, 1971, formally announcing the adoption of the new program. Revisions to the Forest Service Manual implementing the new set-aside program had been distributed to regional foresters on July 21, 1971. There was no Federal Register notice concerning these changes to the Forest

Service Manual, nor was any broad industry participation permitted or sought considering these regulations. On December 29, 1971, an Inter-Agency Agreement was signed between the SBA and the Department of Agriculture formalizing the adoption of the new set-aside program.

C. The Nature of the Current Set-Aside Program

As finally adopted, the new set-aside program operates as follows:

1. The program is premised upon a "base average share," representing the percentage of national forest timber purchased by small business during the five-year period, 1966-1970.[5] The base average share is to be recomputed at intervals of not more than five years. Defendants have declared that the initial 1966-1970 base average share represents the "fair proportion" of national forest timber to which small business is entitled.[6]

2. The program provides that whenever small business fails to purchase its base average share (a) by 10 or more percentage points of the volume sold in the past six-month sales period, or (b) by an accumulated 10 or more percentage points for consecutive six-month sales periods, a mandatory program of set-aside sales is required ("triggered") for the next six-month period.[7]

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[5] The program, while national in scope, is administered by "market area", which generally coincides with a national forest.

[6] Forest Service Manual ¶ 2431.15.

[7] Forest Service Manual ¶ 2431.16. A December 1975 revision to the Forest Service Manual changed the "triggering" mechanism of the program to provide that set-asides would be required when there is an accumulated volume deficit of ten percent of the small business share for the past six-month period; the small business share for the current period is sold as set-asides, while the accumulated deficit volume is to be planned for sale during the ensuing twelve-month period.

This triggering mechanism is automatic without regard to timber need.[8]

3. The program has been designed to assure that the "fair proportion" of Forest Service timber volumes sold thenceforward will either (a) remain essentially the same or (b) will increase above the small business base average share determined as of the 1966-1970 five-year period. This is accomplished by a number of devices:

a. Changes in size status (*e.g.*, from "small" to "large") during any five-year period after 1970 are ignored until the next five-year period. Thus, the small business base average share remains the same during the five-year period, regardless of changes in industry structure, no matter how major.[9] As a result, continued purchases of Forest Service timber sales in approximately the same annual volumes previously purchased by a business which has changed status from small to large would tend to trigger more frequent set-aside sales, maintaining a constant, albeit artificial, small business share.

b. The small business share increases in successive five-year periods whenever small businesses collectively purchase volumes greater than the base average share for a given five-year period. This is easily accomplished since small businesses are virtually guaranteed the base average share for that five-year period through the set-aside device and are free additionally to purchase sales not sold as set-asides.

[8] For instance, if small business has a backlog of timber under contract or access to other timber so that no bids are made on national forest timber during a six-month sales period, the triggering mechanism will require the scheduling of set-aside sales. This obviously discourages small business self-sufficiency and makes the national forests a small business preserve.

[9] Forest Service Manual ¶ 2431.15.

c. The original 1966-70 small business base average share can be reduced only under a very special combination of circumstances—when (1) in the final six months of a five-year period no set-asides have been triggered, and (2) during the preceding four and one-half years small businesses have not accumulated volumes in excess of their base average share sufficient to offset the portion of the base average share they fail to purchase during the last six-month period.

d. No computation of the small business base average share for a five-year period after 1970 will be permitted to result in a reduction of the base average share to less than 50 percent of the base average share computed for the 1966-1970 period.[10] This floor is absolute and this minimum share remains even if there are no small businesses in the marketing area.

D. The Proceedings Below

Petitioners filed suit for declaratory and injunctive relief on the grounds that there was insufficent legal and no factual basis for the new program, that its adoption was procedurally defective and in violation of several federal statutes, including the Small Business Act, 15 U.S.C. §§ 631 *et seq.*, and the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321 *et seq.* Following extensive discovery proceedings, during which defendants *admitted* that the entire administrative record was before the court and that they had made *no studies of any kind* to determine the cause of the alleged decline in small businesses in the forest products industry, the case was submitted to the district court on cross-motions for summary judgment. On August 28, 1974, the court granted defendants' motion for summary judgment and dismissed the complaint. The court of ap-

[10] *Ibid.*

peals, in a brief per curiam opinion, adopted the opinion of the district court and affirmed on July 6, 1976.

REASONS FOR GRANTING WRIT

The national forests constitute a significant part of the timber resource base available to the forest products manufacturing industry. The national forests contain 18% of the approximately 500 million acres of land in the United States classified as available and suitable for growing commercial timber.[11] The national forests currently contain in excess of 50% of the nation's softwood inventory of sawtimber size;[12] they have been supplying approximately 26-28% of the softwood timber harvested in the United States in the last 15 years,[13] and have the capability of furnishing a far greater amount. All size segments of the forest products industry, large, medium and small, have a dependence on the availability of national forest timber. The administrative action sought to be reviewed is thus of pervasive significance to the entire forest products industry.

The Federal Timber Sales Set-Aside Program is of national applicability and its effect on the forest products industry, while already substantial, will intensify with the passage of time. By administrative fiat, the defendants are determining the future competitive characteristics of the industry and are allocating specified portions of national forest timber sales to a designated segment of that industry. The program also adversely affects communities which are economically dependent upon forest products manufacturing enterprises conducted by large businesses while conferring correspond-

[11] USDA, *Outlook for Timber in the United States*, p. 11 (1973).

[12] *Id.* at 29. Softwoods represent 64% of the total volume of all classes of timber and 75% of the total sawtimber volume. *Id.* at 27.

[13] *Id.* at 275.

ing benefits on other communities and reducing the safety of many capital investments in that industry. The principal issue for review is whether an economic decree of such far-reaching national consequence can be issued under the authority of the Small Business Act.

Another issue warranting review by this Court is whether agency action of such great moment can validly be taken without full factual investigation and development of a rational basis in fact for the action. The decision of the district court and the court of appeals legitimized a course of administrative agency action largely devoid of the rational decision-making required by this Court of government agencies. A radical new program of mandatory allocation of federal timber to small businesses, the purpose of which is to freeze industry structure in perpetuity, should not pass judicial muster where it is based on bureaucratic whim or preconception rather than on full factual ventilation of the matters raised.

I.

The court of appeals and the district court have given a broad new interpretation to the Small Business Act, 15 U.S.C. §§ 631 *et seq.*, which should be reviewed by this Court. The import of their decisions is to transform a federal assistance statute for small businesses into a trade regulation statute and to authorize the SBA to act as a super-Federal Trade Commission.

The proferred justification for the adoption by defendants of the new set-aside program was the decline in the number of small businesses in the forest products manufacturing industry, allegedly due to their inability to purchase sufficient quantities of national forest timber in competition with large businesses. An equally unfounded justification was given when defendants filed an "Environmental Analysis Report" on the adoption of the program during the course of this litigation (in response

to petitioners' contention that the adoption violated NEPA):

> [T]he 1971 Agreement is intended to have the economic effect of retarding the increasing trend toward economic concentration in the industry produced by mergers and acquisitions of the small concerns by their large counterparts.[14]

Given the true purpose of the new set-aside program—to regulate competition—the nature and effect of its sweeping provisions are more easily understood. They are deliberately designed: (1) to increase the small business share of national forest timber purchases by ignoring economic realities in the industry and (2) to change the economic structure of the industry by discouraging and penalizing legitimate and necessary expansion and growth. These goals have the intended effect of:

(1) Restricting sales and exchanges of timber acquired by purchase of set-asides;[15]

(2) Discouraging the sales of small businesses dependent on national forest timber to large businesses;

(3) Discouraging growth and expansion either into related or unrelated businesses, for fear of exceeding the 500-employee size standard and of losing the right to purchase set-aside timber;[16]

[14] Environmental Analysis Report at 3.

[15] 13 C.F.R. §§ 121.3-9(b)(2) and (3) (1976).

[16] If a business is approaching the size standard limit and is dependent upon national forest timber, it will naturally resist taking any action which will cause it to exceed the size standard. This is contrary to the stated policy of the SBA:

> [S]mall business concerns should not rely on continuing assistance under the Small Business Act from cradle to grave, but should plan for the day on which they become other than small business and should be able to compete without assistance. 13 C.F.R. § 121.3-1(b)(2)(iv) (1976).

(4) Freezing the industry by location as well as structure since large business is effectively precluded from installing or acquiring new facilities in areas where the small business share is already a substantial proportion of the national forest timber sold in that location;[17]

(5) Detering large businesses from bidding upon non-set-aside sales for fear of triggering additional set-aside sales.[18]

Operation of the set-aside program causes deliberate discrimination against established large businesses when set-asides are triggered by affording to the Small Business Administration opportunity to designate which sales of national forest timber will be made as set-asides.[19] The consequence is that sales with the best quality timber, least expensive development costs, best opportunity for profit, or which, if made as open or unrestricted sales, would have some inherent competitive advantage to one or more large business mills because of proximity to them, are selected for set-asides. Thus, mills operated by large businesses are not only precluded from bidding on the same volumes of timber available to small businesses, they also must buy the less attractive offerings in competition with benefited small businesses.

Figures submitted by the defendants below illustrate the impact this program is having on the availability of

[17] A large business is obviously not going to install a new facility in an area where reliance must be placed upon national forest timber for raw materials and where small businesses are effectively guaranteed acquisition of much of that timber.

[18] The deposition testimony of an SBA official indicated that this "chilling effect" was clearly intended. Deposition of Gene F. VanArsdale, Chief, Prime Contracts and Property Sales Division, SBA, at 216.

[19] Forest Service Manual, ¶ 2431.18. The practice has been for SBA personnel to make the selection of sales for set-aside, usually after consultation with the benefited small businesses.

national forest timber to petitioners and other members of the disadvantaged "large business" category. These figures showed that in the first 2½ years of the program's operation, the small business share increased from 44% (for the 1966-70 base period) to 48.7% (for the 1971-mid-1973 period), representing an increase of over 1,000,000,000 board feet.[20] These figures also showed that the average annual volume of set-aside sales increased by over 65% in the first two years under the program.[21] This increase continued through fiscal 1975 when it was reported by the Acting Administrator of the SBA that, in that fiscal year, set-aside sales totaled $126 million out of a total of $836 million in federal timber sales.[22] It was further reported that small business purchases in that year set a record in total sales, total dollar amounts and total board feet.[23]

By way of further illustration of the pernicious effects of the program, petitioners have prepared the following table of national forest marketing areas in Forest Service Region 6, which sold 27% of all national forest timber in 1975, where the small business share is set at such a level that "large business" entry or expansion (no matter how economically or environmentally sound) in these areas is at the very least discouraged, and probably foreclosed.

[20] Environmental Analysis Report at 12.

[21] *Ibid.*

[22] *Hearings on Procurement Assistance Programs of the SBA Before the Senate Select Committee on Small Business*, 94th Cong., 1st Sess. at 25 (1975).

[23] *Ibid.*

Region 6 Marketing Area	% small business share	1975 sale volume (MMBF)
Fremont—Klamath Basin	62.3	75.8
Gifford Pinchot South	66.9	263.4
Mt. Baker	66	183.6
Mt. Hood—East Side	95	93.2
Olympic—Peninsula	59	104.3
Olympic—Quinault	70	65.0
Rogue River	69.3	229.8
Siskiyou—West	73.4	127.7
Siuslaw—Hebo	58.9	70.1
Siuslaw—Alsea/Wesport	80.4	182.6
Siuslaw—Mapleton/Smith River	68.4	98.6
Willamette—Middle	73	129.7
Willamette—South	53	430.3
Winema	59.6	107.8
		2,161.9

There is a real likelihood that these areas and others like them will become perpetually reserved for small business interests. Forest Service figures show that in 1975, 68 out of the 153 marketing areas in the United States had small business shares of over 65%—a figure high enough to probably foreclose any "large business" entry or expansion.

The far-reaching, permanent administrative program manifested by the provisions of the set-aside program and their effects clearly cannot be sustained upon the statutory authority of the Small Business Act to "aid, counsel, assist, and protect (small business)" or to assure that "a fair proportion of the total sales of government property be made to small-business concerns." 15 U.S.C. §§ 631(a), 644.

Petitioners have never disputed the fact that *a* timber set-aside program is authorized by the Act *provided a*

need for one is established and the program is rationally and reasonably designed to meet that need. The Small Business Act recognized a *general* need among *some* small businesses for federal assistance. However, it is the SBA's statutory duty to investigate and determine specifically (a) which small businesses need assistance, (b) how much assistance is needed, and (c) what kind of assistance is needed.[24] The present set-aside program contains no such provisions. The SBA's assumption that it can simply step in and regulate competition whenever it thinks it perceives a problem for small business—an assumption left standing by the action of the lower courts —is an altogether unjustifiable and unsupportable interpretation of the Small Business Act and one which should be passed upon by this Court.[25]

II.

One of the reasons proferred initially by the defendants for adoption of the new set-aside program was that it was needed to retard a decline in the numbers of small business sawmill enterprises. In discovery proceedings before the district court, petitioners elicited admissions from the defendants that they had no factual support for that hypothesis. Additionally, defendants conceded they had made no efforts to develop any factual

[24] *See* 15 U.S.C. § 637(c); H.R. Rep. No. 555, 85th Cong., 1st Sess., at 16 (1957). Yet, the district court made the surprising finding that small business need for timber was not a factor which had to be taken into consideration in adopting the current set-aside program because the need had already been established by the Act. 382 F. Supp. at 371 (Appendix B at B-12).

[25] It should be noted that Congress has expressly limited the SBA's authority to sanction anticompetitive activity in assisting small businesses. The SBA may permit voluntary agreements among small business concerns, *but only at the request of the President and after consulting with the Attorney General and the Chairman of the Federal Trade Commission.* 15 U.S.C. § 640. *See* H.R. Rep. No. 555, 85th Cong., 1st Sess., at 15 (1957).

support and, in fact, rejected an offer by petitioners to delve into the factual basis for the alleged small business decline. Based on the deposition testimony of defendants' witnesses, the extent of the factual information before the defendants can be summarized as follows:

(a) Defendants had no documentation of a small business decline; indeed, they did not know whether such a decline had occurred; it *appeared* that way to them.

(b) Assuming such a decline, defendants had no information as to the cause or causes thereof, nor did they attempt to develop any.

(c) Defendants acknowledged that a small business decline could be attributable to any number of factors unrelated to the matter of timber availability.

(d) Defendants did not even maintain or compile any data as to the size class distribution (large or small business) of national forest purchasers.

In short, the administrative record developed by the defendants was devoid of any factual information, much less support, with respect to the action taken.[26] Only to the extent that administrative action speaks to or deals with a factually identified problem can the administrative action be valid. For example, if a factual investigation indicated that a decline in the number of small business sawmills was attributable to a general lack of investment capital, then there would be no rational basis in fact for adoption of the set-aside program at issue here nor would there be a logical nexus between the ills

[26] In granting summary judgment for the defendants, the district court relied in part on extra-record materials never submitted to, nor considered by the defendants. This was wholly impermissible and erroneous. *Zuber* v. *Allen*, 396 U.S. 168, 196 (1969); *cf.*, *NLRB* v. *Metropolitan Life Ins. Co.*, 380 U.S. 438, 444 (1965); *SEC* v. *Chenery Corp.*, 318 U.S. 80, 92 (1943).

sought to be cured and the action taken. *See, e.g., Bowman Transp. Inc.* v. *Arkansas-Best Freight Sys.*, 419 U.S. 281, 285 (1974); *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168 (1962).

The Small Business Act does not confer unbridled authority on the SBA to adopt any and all kinds of programs, regardless of justification. To the contrary, agency authority under the Small Business Act is to be administered in accordance with established precepts of administrative law, a cornerstone of which is the requirement for *rational* decision-making. *Citizens To Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 415-16 (1971).

III.

The administrative process by which the defendants considered the new set-aside program was characterized by an informality and lack of regularity hardly in keeping with the importance of the issues involved. There was no Federal Register notice of the proposed agency action nor were there any hearings to collect data or information upon which agency action might be developed. There is no evidence that any body of agency expertise existed on the subject under consideration. No statement of basis and purpose (as required by § 4(c) of the APA, now codified at 5 U.S.C. § 553(c)) was issued by the defendants upon adoption of the program. In short, there was no attempt to comply with the APA.

The defendants substituted for the fundamental procedural requirements of the APA a highly informal process which deprived petitioners of a meaningful participation in the decision-making process.[27] Specifically,

[27] This same irregularity deprived the reviewing courts of a statement of the defendants' rationale for adoption of the new set-aside program, a procedural regularity which this Court has repeatedly safeguarded. *See, e.g., FTC* v. *Sperry & Hutchison Co.*, 405 U.S. 233, 249 (1972); *NLRB* v. *Metrolopitan Life Ins. Co., supra*, at

petitioners were deprived of the opportunity to make their case in the only appropriate forum, the defendant-agencies themselves, and in accordance with hearing procedures which would have provided for full ventilation of the issues. Petitioners attempted to make a direct presentation to the defendants once petitioners were aware of the proposed new program, but this proved futile as well, since the agency decision had been made before these meetings were held.[28]

The lower courts sanctioned this informal procedure because of the APA exemption provided for matters relating "to public property, loans, grants, benefits, or contracts." 5 U.S.C. § 553(a)(2). Although petitioners maintained that the "public contract" exemption did not apply to the facts of this case,[29] they stressed that, even if it did, both the SBA and the United States Department of Agriculture (of which the Forest Service is a part) had *expressly waived* their right to rely upon the exemption by agreeing to be bound by the APA rulemaking procedures in all cases.

424-43. In fact, the need for articulation is heightened when the agency action constitutes, as in this case, a departure from prior agency practice. *NLRB* v. *Metropolitan Life Ins. Co., supra* at 443-44; *Atchison, T. & S.F. Ry.* v. *Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973).

[28] This hardly comported with the "meaningful participation" described in *Walter Holm & Co.* v. *Hardin*, 449 F.2d 1009, 1016 (1971):

> What counts is the reality of an opportunity to submit an effective presentation, to assure that the Secretary and his assistants will take a hard look at the problems in the light of these submissions.

[29] The courts have narrowly construed this exemption and have ruled that where the rulemaking in question has broad substantive impact or substantially affects parties outside of the agency, the exemption is inapplicable. *Housing Authority of the City of Omaha* v. *United States Housing Authority*, 468 F.2d 1, 9 (8th Cir. 1972), *cert. denied*, 410 U.S. 927 (1973). *P.A.M. News Corp.* v. *Hardin*, 440 F.2d 255 (D.C. Cir. 1971).

While the SBA did not publish its notice of waiver until August 25, 1971,[30] six days after the announced adoption of the set-aside program (but four months before execution of the Inter-Agency Agreement), the USDA published its notice of waiver on July 24, 1971,[31] almost one month *before* the announced adoption and more than five months before the Inter-Agency Agreement was actually signed (December 29, 1971). Nevertheless, the district court ruled that the APA rulemaking procedures were inapplicable to the adoption of the set-aside program.[32]

The district court's ruling was affirmed in the court of appeal's per curiam opinion despite a contrary ruling by the same court of appeals one year earlier in *Rodway* v. *USDA*, 514 F. 2d 809 (D.C. Cir. 1975). In the *Rodway* case the District of Columbia Circuit held that the *very same* July 24, 1971, waiver by the USDA of the "public contract" exemption involved here was fully applicable to agency action taken a mere *five days* later, on July 29, 1971, and that the APA requirements had to be met with respect thereto.[33] No valid distinguishing reason exists for this disparate treatment. This decisional aberration should be corrected.

The procedural informality was reflective of the *a priori* nature of the agency determination. The defend-

[30] 36 Fed. Reg. 16716-17 (1971).

[31] 36 Fed. Reg. 13804 (1971).

[32] 382 F. Supp. at 373, Appendix B at B16-17.

[33] 514 F.2d at 814. The USDA, as a result of having waived its right to rely upon the "public contract" exemption, has also been held to have violated the APA rulemaking provisions by terminating its Farmers' Home Administration emergency loan program without formal notice and hearing. *Berends* v. *Butz*, 357 F. Supp. 143, 153-55 (D. Minn. 1973). *See also Tyson* v. *Maher*, 523 F.2d 972 (2d Cir. 1975), and *Florida* v. *Weinberger*, 401 F. Supp. 760, 761 (D.D.C. 1975) both dealing with the effect of waivers of the "public contract" exemption.

ants were not concerned with the relevant facts, only the end result. It is this very kind of arbitrary agency action that the APA, with its procedural protections, was designed to eliminate. *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 764-65 (1969) (opinion of Fortas, J.).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 4, 1976

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-2066

DUKE CITY LUMBER COMPANY, ET AL.,
Appellants

v.

EARL BUTZ, SECRETARY OF AGRICULTURE, ET AL.

Appeal from the United States District Court
for the District of Columbia

(D.C. Civil Action 2152-72)

Argued December 16, 1975

Decided July 6, 1976

Pierre J. LaForce, with whom *Angelo A. Iadarola* and *Jerry R. Goldstein* were on the brief, for appellants.

Richard A. Graham, Assistant United States Attorney, with whom *Earl J. Silbert*, United States Attorney, *John A. Terry* and *Paul M. Tschirhart*, Assistant United States Attorneys, were on the brief for appellees.

H. Robert Halper, with whom *Terence P. Boyle*, *Mark P. Schlefer*, *Michael Joseph* and *William H. Fort*, were on the brief for appellee/intervenor Bennett Lumber Products Inc., et al. and Alsea Lumber Co., et al.

Before MR. JUSTICE CLARK,* *of the Supreme Court of the United States*, and ROBINSON and MACKINNON, *Circuit Judges.*

PER CURIAM: This suit, now pending for over three years, attacks the validity of the 1971 changes in the small business timber set-aside program as established by the Memorandum of Understanding between the Small Business Administration and the United States Department of Agriculture. The appellants are twelve forest product manufacturing companies that are not eligible for set-aside sales under the program because they exceed the fixed standard of 500 employees or less in measuring the eligibilty of a business to participate. 13 C.F.R. 121.3-9(b). They assert that a new triggering mechanism for the program is arbitrary and capricious, is beyond the statutory authority of the agencies, and violates their due process rights as well as national forest administration statutes, the National Environmental Protection Act, and other federal laws.

We have made a detailed study of the voluminous records in the case, including numerous exhibits, briefs, and depositions as well as the opinion of the District Court, 382 F. Supp. 362 (D. D.C. 1974). The district judge has written an able opinion in which he deals with each of the appellants' contentions at length. We have concluded that nothing would be gained by our writing extensively on the matter. We, therefore, adopt the opinion of the District Court, save in one respect.

The District Court carefully considered the Government's attack upon the jurisdiction to hear appellants' claim. We do not disagree with the District Court's determination that appellants meet the tests for standing announced by this circuit in *Ballerina Pen Company* v.

* Mr. Justice Tom Clark, United States Supreme Court, Retired, sitting by designation pursuant to 28 U.S.C. § 294(a).

Kunzig, 140 U.S.App.D.C. 98, 433 F.2d 1204 (1970), *cert. denied*, 401 U.S. 950 (1971), and believe that the District Court intended that its comments and findings on standing be considered as also relevant to the question of ripeness. A careful review of the *Abbott Laboratories* trilogy,[1] convinces us that, for the most part, appellants' challenge to the 1971 guidelines was ripe for review.[2] We are not convinced, however, that this is the appropriate case to review that part of the guidelines that would prevent the "historical share" figure from being revised below 50% of the original base period figure. Admittedly, that portion of the guidelines could hold the most mischief for appellants, but they have neither proved its probability nor demonstrated adequately that it is any more than an abstract possibility at this time. None of the briefs address the question to our satisfaction nor could they, given the present state of the record. Accordingly, we decline to pass on the question, reserve it for some later time when it is ripe for review, and revise so much of the District Court's opinion that may be construed as dealing with the question of the 50% preservation minimum.

It is so ordered.

[1] *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967); *Gardner* v. *Toilet Goods Ass'n*, 387 U.S. 167 (1967); and *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158 (1967).

[2] The question of ripeness goes to our subject matter jurisdiction, and thus we can raise the issue *sua sponte* at any time. *Mansfield, Coldwater & Lake Michigan Ry.* v. *Swan*, 111 U.S. 379, 384 (1884).

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. No. 2152-72

DUKE CITY LUMBER CO., ET AL.,
Plaintiffs,

v.

EARL L. BUTZ, SECRETARY OF AGRICULTURE, ET AL.,
Defendants,

and

BENNETT LUMBER PRODUCTS, INC., ET AL.,
Intervening Defendants.

Aug. 28, 1974

MEMORANDUM OPINION

CHARLES R. RICHEY, District Judge.

These parties are before the Court on Cross-Motions for Summary Judgment. At issue in this suit is the legality of the 1971 small business timber set-aside program as established by the Memorandum of Understanding [1] between the Small Business Administration (SBA) and the United States Department of Agriculture (USDA).

The Plaintiffs, twelve forest product manufacturing companies, who are ineligible for the program because

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[1] The agreement was signed December 29, 1971. The 1971 program supplants an earlier set-aside program established December 2, 1958 and amended in 1966. The procedure for implementing the 1971 program is contained in the Forest Service Manual Amendment No. 67, Paragraphs 2431.11-2431.19. The SBA and the USDA administer the program jointly.

of their size,[2] have asked the Court to declare the program illegal and enjoin its further implementation by the U. S. Forest Service. The Plaintiffs attack the program as an example of an agency's arbitrary and capricious rulemaking overriding considerations of statutory authority, rational decisionmaking, administrative due process, as well as the applicability of environmental statutes, national forest administration statutes and other federal laws.[3]

The Defendants in this case are the Secretary of Agriculture, the Chief of the U.S. Forest Service, and the Small Business Administrator. A number of independent small forest products manufacturers and several associations have been permitted to intervene as Defendants, having demonstrated that they have a direct interest in the continuation of the 1971 set-aside program.

Upon careful consideration of the voluminous pleadings and exhibits filed in this action, as well as the able arguments of counsel, and there being no material fact in issue, the Court will grant the Defendants' Motion for Summary Judgment for the reasons set forth below.

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[2] 13 C.F.R. 121.3-9(b) provides a standard of 500 employees or less to measure a business' eligibility for the program.

[3] Specifically, the Plaintiffs allege the SBA-USDA action falls outside the statutory authority of the Small Business Act. 15 U.S.C. §§ 631(a) and 644; that it has no rational basis in fact; and that it is violative: (1) of the 5th Amendment as deprivation of property without due process or just compensation; (2) of the rule-making requirements of Sec. 4 of the Administrative Procedure Act, 5 U.S.C. § 553; (3) of the National Environmental Policy of 1969, 42 U.S.C. §§ 4321-4347, and Executive Order No. 11514 for failing to file an environmental impact statement; (4) of federal statutes governing the administration of the National Forests, namely, 16 U.S.C. §§ 581, 582a, 583, 475, 476, 528-531, 590a, 594-1, and 594a; (5) of the Employment Act of 1946, 15 U.S.C. § 1021; and (6) of the Economic Stabilization Act Amendments of 1971. 15 U.S.C. § 1026(a).

I. BACKGROUND

The 1971 set-aside program and its 1958 predecessor have their roots in the Small Business Act. 15 U.S.C. § 631 et seq. Congress considered small businesses to be the backbone of the American system of private enterprise and free competition. Finding that the nation's economic security and well-being depended upon the continued existence of small business, Congress created the Small Business Administration to assist and protect small businesses in so far as possible. In particular, the SBA was directed to work with other agencies to insure that small businesses received a "fair proportion" of the total sales of government property. 15 U.S.C. § 644(4).

Pursuant to this directive, in 1958 the SBA and USDA established the mechanism for the first timber set-aside program.[4] The program was administered, however, on an *ad hoc* basis. The Forest Service would reserve a timber sale solely for small business competition, only if a "need" could be factually demonstrated. This proof was often difficult to establish, as any evidence submitted could be rebutted by other interested parties who would not necessarily benefit from a set-aside.

With the decline in the number of timber purchases by small businesses[5] and the increase in the number of ac-

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[4] Under the 1958 program in some regions the Forest Service used a three year "rolling" base average to determine small business' share of the timber market when calculating set-aside needs. The "rolling" concept meant a three-year average, which was revised every year to reflect a new three-year period. Deposition of Gene F. VanArsdale, Chief Prime Contracts and Property Sales Division, Office of Procurement Assistance, Small Business Administration, taken January 25, 1974 (hereinafter, *VanArsdale Deposition*) at 16-17.

[5] A survey of six Forest Service Western Regions showed small businesses had purchased 75% of the National Forest timber in 1958 and 44% in 1966-70. USDA, Forest Service, *Environmental*

quisitions of small concerns by large companies[6] (including the Plaintiffs) the SBA re-examined the set-aside program. The SBA found the 1958 set-aside program to be too ineffective to insure small business a "fair proportion" of national forest timber sales. The procedure for instituting a set-aside sale was cumbersome.[7] The program had no definite guidelines for determining either when a timber set-aside was necessary or the volume of timber needed to be set aside.[8]

The present set-aside program modified the 1958 program in three aspects. There is an historical approach for determining "fair share", a five-year time period for

Analysis Report, Small Business Administration Set-Asides for National Forest Timber Sales dated January 30, 1974, filed February 5, 1974 as a supplemental answer to Plaintiffs' Interrogatory No. 6e (hereinafter, *Report*) at 6.

The SBA received reports that high bids by larger timber companies precluded small business from competing in unrestricted sales because they could not process the timber at a profit. *VanArsdale Deposition* at 170, 182, 209. The SBA had further reports of successful higher bidding by large companies who had not previously competed in a particular forest. *Id.* at 179.

See Government's Answers to Plaintiffs' Interrogatories, Exhibits A-1 through A-5 for an indication of large business' significant increases in national forest timber purchases.

[6] Affidavit of Mr. VanArsdale attached to the Defendants' Motion for Summary Judgment filed August 30, 1973 (hereinafter, *VanArsdale Affidavit*) at par. 7 & 8. See also, Exhibit 4 of VanArsdale Affidavit, which is a memorandum of November 19, 1970 indicating the mergers of small companies into large ones in California for the two previous years. See also, *VanArsdale Deposition* at 152.

[7] To institute a set-aside, a small business had to submit a complaint. There then had to be finding of "need" by the SBA timber specialist. The proof of need was then submitted to the regional Forest Service supervisor for his finding. If the two agreed a set-aside sale was instituted. Deposition of Mr. Paul E. Neff, Retired Director of Timber Management, Forest Service, USDA, taken January 18, 1974 (hereinafter, *Neff Deposition*) at 12-14, 20, 24; *VanArsdale Deposition* at 11, 12-24.

[8] *VanArsdale Affidavit*, at par. 6.

determining base average shares of timber purchases, and a triggering mechanism for initiating set-asides.

The SBA has taken the timber sales of 1966-70 and has computed the percentages of the total volume of timber sold to large and small business respectively in each market area.[9] This ratio, based upon a history of actual purchases, sets the framework for the SBA definition of "fair proportion" and it is used in subsequent computations. Every five years,[10] the base period percentages in each market area are revised to provide flexibility and reflect current sales. The Agreement, Paragraph 4a, provides, however, that the recomputed percentages cannot be reduced to more than 50% of the original base period of 1966-70.

Every six months there is a review of the timber purchases in each market area for the previous six months. If the review shows that the small business purchases equal an accumulated net deficit of ten or more per cent than the base period percentage, a set-aside sale is triggered. Had small business purchased a volume of timber above this trigger point but below the base period percentage, there would be no set-aside sale in the following six months. Any surplus above the small business share is carried over from period to periad to offset any deficit. Likewise, any deficiency less than 10 per cent is carried over from period to period

[9] The SBA administers the program in a manner which provides for regional differences such as competition, manufacturing facilities, timber species, marketing characteristics. The local geographical unit, if used for base shares and other tabulations, is called a market area. This area usually coincides with a national forest. However, there are examples of one national forest being divided into several market areas and vice versa. *Id.* at par. 17.

[10] A five-year period was chosen: (1) to average out some periodic fluctuations and inequities; and (2) to provide a period of time which would give the most recent yet historically accurate picture of timber purchases by large and small concerns. *Id.* at par. 16.

until the accumulated deficit reaches 10 per cent at which point the set-aside program is triggered.

The 1971 program retains the 1958 restrictions on small business' resale of timber purchased in a set-aside sale to large business. Forest Service Manual § 2431.12.[11] The program does permit large concerns to purchase any set-aside timber which small business fails to purchase. 36 C.F.R. § 221.8. Furthermore, under Paragraph 4b of the 1971 agreement, any such set-aside timber large business purchases is counted toward the base share of small business.

Despite the agreement's precise triggering mechanism, if a proposed set-aside sale would be inappropriate or work an undue hardship, the sale can be eliminated or triggered upon a different percentage deficiency.[12] As a final safety catch, Paragraph 6 of the Agreement permits a set-aside to be withdrawn after it has been programmed, if subsequent events indicate a set-aside sale would not be in the public interest.

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[11] Small business must agree that it will not sell more than 30 per cent of the timber acquired in a set-aside sale. The 30 percent restriction can be changed in those geographical areas where it is appropriate due to the nature of the industry (i.e., the 50 per cent restriction in Alaska). The restriction applies only to a resale to a large business. It does not apply to timber exchanges with large business, nor does it apply to a resale to a small business. The restriction in no way affects a small business' resale of timber purchased in an unrestricted (i.e., non set-aside) sale of national forest timber.

[12] Paragraph 4c of the 1971 Agreement provides:

> "The above provisions do not preclude USDA and SBA from taking other factors into consideration in specific cases when computing base average share, nor *from otherwise establishing or eliminating set-asides which they deem appropriate* under the Small Business Act. USDA and SBA may make allowance for such factors as past long-term sales, large salvage sales, or other unusual considerations, when computing the base average share." (emphasis added).

Small business purchases a major portion of its national forest timber in unrestricted sales. In fact, only five per cent of the total volume of national forest timber has been sold at set-aside sales. During the 2½ years that the program has been in effect (January 1971-June 1973), the Forest Service has sold approximately 23 billion feet of sawtimber which falls within the set-aside program. Small business has purchased 11.2 billion feet. However, only 1.3 billion of the 11.2 billion feet was purchased in set-aside sales.[13]

II. THE PLAINTIFFS HAVE STANDING TO BRING THIS ACTION UNDER THE BALLERINA PEN STANDARD.

The threshold issue before the Court is the question of standing. The Plaintiffs predicate their standing on Sec. 10 of the Administrative Procedure Act, 5 U.S.C. § 702.[14]

This Circuit has adopted a liberal position regarding a party's standing to challenge administrative action. E.g., Ballerina Pen Company v. Kunzig, 140 U.S.App. D.C. 98, 433 F.2d 1204 (1970), cert. dismissed 401 U.S. 950, 91 S.Ct. 1186, 28 L.Ed.2d 234 (1971); Scanwell Laboratories, Inc. v. Shaffer, 137 U.S.App.D.C. 371, 424 F.2d 859 (1970). This position stems from a combination of the Court's experience that a person who brings an action challenging agency activity is one who most invariably has been injured either directly or indirectly

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[13] *Report* at 12. Thus, small business has purchased approximately 89 per cent of its national forest timber purchases through unrestricted sales.

[14] Section 10 of the Administrative Procedure Act provides:

> "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

by that action, and the crucial need to insure that agency action, ostensibly taken to promote the public good, is founded upon the proper basis of Congressional authority rather than mere good intention, personal insight, prejudice or predilection. *Ballerina Pen Co., supra* at 102, 433 F.2d at 1208-1209.

In *Ballerina Pen*, the Court of Appeals adopted a three-part standard to test a party's standing in challenges to administrative action.[15] Under it, a plaintiff has standing if (s)he alleges (1) that the challenged action has caused or will cause the plaintiff injury in fact, so as to insure that (s)he has a personal stake in the outcome of the controversy; (2) that the agency action was arbitrary, capricious, and in excess of statutory authority so as to injure an interest "arguably" within the zone of interests to be protected or regulated by the statute in question; and (3) that there must be no "clear and convincing" indication of a legislative intent to withhold judicial review. 140 U.S.App.D.C. at 101, 433 F.2d at 1207, citing Association of Data Processing Service Organizations v. Camp (ADPSO), 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970); Barlow v. Collins, 397 U.S. 159, 90 S.Ct. 832, 25 L.Ed.2d 192 (1970); *Scanwell Laboratories, supra*, at 381, 424 F.2d at 869, 875 n. 10, 19.

The Plaintiffs meet the three requirements of the *Ballerina Pen* standard. The crux of the Plaintiffs' com-

[15] This standard is applicable even in the absence of specific "person aggrieved" language in the statute under which the action is brought.

It must be remembered that a correct analysis of the question of standing requires the Court to look at the party's status and not at the merits of the case. Blackhawk Heating & Plumbing Co. v. Driver, 140 U.S.App.D.C. 31, 35, 433 F.2d 1137, 1141 (1970); *Scanwell Laboratories, Inc., supra*, at 383-384, 424 F.2d at 873. A summary judgment proceeding under Rule 56 of the Federal Rules of Civil Procedure is a prime vehicle with which to eliminate frivolous lawsuits parties can bring under this liberal test for standing.

plaint is that the implementation of the 1971 set-aside program penalizes their natural growth, freezes, in perpetuity, their size, location and relationships within the industry at the 1966-70 level, and interferes with their prospective beneficial business relationships. The Court is of the opinion that this allegation is sufficient to meet the injury in fact requirement. *Cf. Assoc. Data Proc. Ser. Org., supra; Scanwell Laboratories, supra;* Gonzalez v. Freeman, 118 U.S.App.D.C. 180, 334 F.2d 570 (1964); *see also,* Superior Oil Co. v. Udall, 133 U.S.App.D.C. 198, 409 F.2d 1115 (1969).

As to the second criteria, the Plaintiffs argue that the SBA has irrevocably imposed an arbitrary market structure upon the industry—a structure contrived without consideration of economic realities, the natural changes in the industry structure or who is the actual purchaser of the national timber. It would appear that the Plaintiffs' interest in achieving its maximum economic potential within the American system of private enterprise is "arguably" within the zone of interests sought to be protected by the Small Business Act. The Act seeks to promote a continuation of free competition. The Act attempts to realize this goal by assisting small businesses to achieve their maximum potential. The purposes of the Act would not be achieved, however, if the aid to small business consisted of a structure which undermined the vitality of other businesses within the industry. Inherent in such action are the seeds of destruction of the same free system the Act is intended to protect.

In considering the last requirement, it is quite plain that the Small Business Act does not contain any clear and convincing provision indicating that the SBA Administrator's discretionary actions are precluded from

judicial review.[16] Therefore, the Plaintiffs have standing to pursue this action.

III. THE DECISION TO INSTITUTE THE 1971 SET-ASIDE HAD A RATIONAL BASIS AND WAS WITHIN THE ADMINISTRATOR'S STATUTORY AUTHORITY.

The real bone of contention in this suit is the Administrator's decision to change the 1958 program.[17]

[16] Section 634(b)(1) of the Small Business Act, which prohibits the issuance of an injunction against the Small Business Administrator "in the performance of, and with respect to, the functions, powers, and duties vested in him by this chapter," is not clear and convincing evidence that the Administrator's action in this instance is precluded from judicial review. Despite the wide discretion and broad powers with which the Administrator is vested, it would appear from the language of § 634 that there is a limitation. Thus, the Court would have the power to review the action and declare it illegal if it was beyond the Administrator's statutory authority. In the instant case, any injunction would issue against the Director of the Forest Service as the implementor of the action, rather than the SBA Administrator.

[17] Despite their protests to the contrary, the Plaintiffs do not attack the principle of a set-aside program. It is obvious that Section 644 of the Small Business Act commands the Administrator and the disposal agency to set aside a fair proportion of government property for the exclusive benefit of small business. *E.g.*, Allen M. Campbell Co. v. Lloyd Wood Const. Co., 446 F.2d 261, 264-265 (5th Cir. 1971). Mid-West Construction Ltd. v. United States, 387 F.2d 957, 181 Ct.Cl. 774 (1963); Massey Services, Inc. v. Fletcher, 348 F.Supp. 171 (N.D.Cal. 1972); American Electric Company v. United States, 270 F.Supp. 689 (D.Hawaii 1967); see 41 Comp.Gen. 306, 311 (1961).

> Section 644 explicitly states that small business: "[*S*]*hall* . . . be awarded any contract for the sale of Government property, as to which it is determined by [the Small Business Administrator] and the contracting procurement or disposal agency . . . to be in the interest of assuring that a fair proportion of the total sales of Government property be made to small-business concerns." (emphasis added)

It is also clear that Congress contemplated the use of set-aside sales for small business in the timber industry. See the remarks of

The Plaintiffs take umbrage with the implementation scheme of the 1971 program because it effectively protects the existence of small timber businesses at the expense of Plaintiff's increasing quasimonopoly of the industry.[18] It is apparent from the factual record in this case that the policy of the Act motivated if not mandated the change in the program.

The Small Business Act clearly grants the Administrator wide discretion to effectuate the purposes of the Act. 15 U.S.C. § 634. This fact the Plaintiffs do not contest. Rather, they argue that the Administrator's substantive decision in this matter was arbitrary, capricious, and beyond the scope of his statutory authority.

The scope of this Court's review in the instant case has been delimited by the standard set forth in Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971). This Court must examine whether the administrative decision was based upon a consideration of the relevant facts and law, and determine whether there has been a clear error of judgment. It is not the Court's duty to weigh the alternatives

Senators James Murray (D., Mont.) and Wayne Morse (D., Ore.) during the debate on the amendment to extend the coverage of the Small Business Act to include the sales of government property.

[18] The Plaintiffs contend that the set-aside program precludes them from substantial amounts of federal timber and thereby impairs their ability to operate at present levels. Upon examining the Plaintiffs' Answers to the Intervening Defendants' Interrogatories, it appears that under the set-aside program, the Plaintiffs have purchased not only their average 1962-1970 share of the national forest, but in several cases have doubled this average. See, Intervening Defendants Motion for Summary Judgment, Exhibit E.

The Plaintiffs have downplayed the facts that often the larger companies have access to private timber held in fee or obtained through timber exchanges to which small companies do not have access. Nor do they emphasize that their revenues and profits continue to increase and that they also grow through acquisitions, despite the "freeze" placed upon the industry by this program.

available to the Administrator and to determine which is the more reasonable. Ray Baillie Trash Hauling, Inc. v. Kleppe, 477 F.2d 696, 703-704 (5th Cir. 1973); see, Allen M. Campbell Co., Gen. Con., Inc. v. Lloyd Wood Construction Co., 446 F.2d 261, 265 (5th Cir. 1971).

The Plaintiffs argue that the Administrator's decision has no rational basis on two counts. First, they claim there was no "proven need" for a uniform, objective triggering apparatus. Second, they allege the computations and formula upon which the program rests are an irrational determination of the statutory "fair proportion".

As a matter of clarification, it should be stated that small business' "need" is not a factor which the Administrator must take into consideration. The "need" has already been established by the Act.

The Plaintiffs' other points regarding the basis of the Administrator's decision consist of unsupported allegations. They offer no evidence contradicting the Administrator's factual determination that small businesses were on the decline at the expense of large business' significant growth. (See a discussion of the Administrator's findings, *supra*, at 366-368.) The Plaintiffs, furthermore, have made no showing that the Administrator's choice of 1971 program was a clear error of judgment in light of other alternatives.[19]

The Administrator adopted the 1971 program after examining the historical position of small business within the timber industry and the problems inherent in the 1958 set-aside program and after listening to the suggestions of members of the industry and weighing the proposed alternatives. The program appears to be the

[19] See, *VanArsdale Deposition* at 75-9; Exhibits B-1 through 65 and D-1 through D-5 attached to the Government's Answers to the Plaintiffs' Interrogatories.

reasonable, precise yet flexible, means of insuring that small businesses receive a "fair proportion" of government timber sales. The ratio of timber sales which the program seeks to preserve is based upon the competitive history within the industry. Small business is guaranteed no more than an opportunity to bid on that proportion of the market which it has purchased in the past.

The Plaintiffs' tangential argument regarding possible Congressional limitations upon the Administrator's admittedly wide discretion is without merit. The Plaintiffs maintain that there is a strong inference that Congress does not approve of a set-aside scheme of the type of the 1971 program. To support this inference the Plaintiffs argue that Congress defeated a Resolution [20] which would have brought to the floor of the House a Bill [21] containing a subsection legislating mandatory set-asides similar to the Administrator's 1971 program.[22] The Plaintiffs also

[20] H.R.Res. 799. Debate on the resolution, 116 Cong.Rec. Part 4 pp. 5099-5117 (Feb. 26, 1970). Several members of the House voted to defeat the resolution as they felt consideration of H.R. 12025 should be postponed until after the issuance of the Report of the Public Land Law Review Commission on June 30, 1970.

[21] The National Forest Timber Conservation and Management Act of 1969 (H.R. 12025, 91st Cong., 1st Sess.) The Bill's initial emphasis was to increase the timber supply in the face of soaring timber and plywood prices. The Bill was never voted upon. 115 Cong.Rec., Index, Part 31, page 1937 (1969); 116 Cong. Rec., Index, Part 34, page 1329 (1970).

[22] Section 7(5) of the Bill directed the Secretary of Agriculture to establish policies which would assure that small businesses collectively would obtain a fair proportion of the total timber sold in each year from each national forest.

The accompanying House Report stated this provision was added to increase the cooperation between the Small Business Administration and the Forest Service to assure small businesses who had suffered along with the rest of the forest industry from the general shortage of timber, could obtain that proportion of the total timber sold annually which represented their collective average percentage of timber from each national forest over the preceding 3 calendar years. H.R.Rep. No. 91-655, 91st Cong., 1st Sess. 10 (1969).

point to the Bill's accompanying report which contains a clause saying the 1958 set-asides were satisfactory.[23] Any conceivable limitation of the Administrator's discretion which could be inferred from this tenuous evidence is rebutted by other Congressional statements which unequivocably laud the 1971 timber set-aside programs.[24]

Based upon the evidence in the record, the Court can only conclude that the Administrator acted within the scope of his statutory duty, in a rational manner, after full consideration of the relevant factors.

IV. THE PLAINTIFFS WERE NOT DENIED ADMINISTRATIVE DUE PROCESS

One of this Court's long-standing concerns has been the enforcement of the Administrative Procedure Act's procedural rulemaking provisions. 5 U.S.C. § 553. The Court's concern is embedded in the belief that administrative agencies have a fundamental responsibility to insure that any rules and regulations which affect the day-to-day existence of our citizens be conceived in an atmosphere immune from prejudice. Upon examination of the facts in this case, however, the Court fails to see how the Plaintiffs can seriously complain that they were prejudiced because the agency did not comply literally

[23] Id. The remark in context is:

"An agreement between the Department of Agriculture and the Small Business Administration pursuant to the 1958 Small Business Act requires that a fair proportion of national forest timber sales be reserved for small business. *The system apparently has worked well* although the small producer, along with the rest of the industry, has suffered from the general shortage of timber as documented in the March 1969 hearings before the Banking and Currency Committee". (Emphasis added).

[24] H.R.Rep. No. 92-1006, 92nd Cong., 2nd Sess. (April 1972) at 17-18.

with the notice and hearing requirements under Section 4 of the Administrative Procedure Act. 5 U.S.C. § 553.

Overlooking for the moment that matters relating to government contracts and property are specifically exempted from the notice and hearing requirements of Section 4,[25] the facts indicate that the Plaintiffs not only had actual notice of the proposed change,[26] but they also attended several industry-wide meetings at which the proposed program was discussed in depth.[27] Furthermore, the Plaintiffs' representatives met privately with agency officials,[28] and submitted an in-depth analysis of the program.[29] As a result of this industry input, the SBA-USDA received and considered many suggested alternatives. Some were adopted. For example, a triggering procedure was incorporated, supplanting an automatic

[25] 5 U.S.C. § 553 provides: "(a) This section applies, according to the provisions thereof, except to the extent that there is involved . . . (2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts."

[26] 5 U.S.C. § 553(b) provides: "general notice of proposed rule making shall be published in the Federal Register, *unless persons subject thereto* are named and either personally served or *otherwise have actual notice* thereof in accordance with law." (Emphasis added).

[27] Meetings were held in Phoenix, Arizona on Feb. 16-18, 1971; Washington, D.C. on March 2, April 22 and July 27-28, 1971, and Portland, Oregon on June 10, 1971. See Exhibit D-1 of the Government's Answers to Plaintiffs' Interrogatories for the minutes of the Phoenix meeting. The minutes consist of a 21 page single-spaced typed report. See also, Exhibits B-1 through B-65 and D-2 through D-5 attached to the Government's answers to the Plaintiffs' Interrogatories for an indication of the extent to which industry participated in the evolution of the program

[28] The Ad Hoc Committee of Federal Timber Purchasers representing the Plaintiffs met with representatives of the SBA and the Forest Service in late July 1971.

[29] On June 1, 1971 Plaintiffs' counsel submitted a 76 page memorandum in opposition to the then proposed timber set-aside agreement.

set-aside procedure which had been previously proposed.[30] In light of these facts, the Court is compelled to find that the Plaintiffs were neither prejudiced nor denied due process. They had sufficient opportunity to participate in the development of the 1971 program. The Plaintiffs can not now claim, in spite of their active participation, that they were prejudiced because the Defendants failed to comply with the formalistic requirements of Section 553. *See*, United States v. Elof Hansson, Inc., 296 F.2d 779, 48 CCPA 91 (1960); *see also*, Florida Citrus Comm. v. United States, 144 F.Supp. 517, 521 (N.D.Fla. 1956).

Nevertheless, the fact remains that Section 553(a) specifically exempts an agency when making rules regarding public property[31] or contracts. When the government is dealing with these matters, Congress affords the government complete discretion to decide what, if any, public rulemaking procedures it should adopt and follow.[32] The Senate Committee on the Judiciary, in its report on this exception to the APA stated:

> "The exception of proprietary matters is included because the principal considerations in most such cases relate to mechanics and interpretation of policy and it is deemed wise to encourage and facilitate

[30] See *VanArsdale Deposition* at 74.

[31] See Attorney General's Manual on the Administrative Procedure Act, p. 27 (1947) defining public property under the Section 4 exemption:

> "Public Property. This embraces rules issued by any agency with respect to real or personal property owned by the United States or by any agency of the United States. Thus, the making of rules relating to the public domain, i.e., the sale or lease of public lands or of mineral, timber or grazing rights in such lands, is exempt from the requirements of Section 4".

[32] Senate Comm. on the Judiciary, Administrative Procedure Act. S.Rep. No. 752, 79th Cong., 1st Sess. 199 (1945). See also in The Congressional Record, the proceedings in the House of Representatives regarding the APA on May 24, 1946.

> the issuance of rules by dispensing with all mandatory procedural requirements . . ."[33]

This statement succinctly characterizes the program in issue. The program merely establishes the mechanics through which the SBA has implemented its interpretation of the declared policy of the Small Business Act. Therefore, due to the type of program in question, the SBA was not obligated to give the Plaintiffs either formal notice or a hearing.[34]

IV. THE SET-ASIDE PROGRAM IS NOT MAJOR FEDERAL ACTION SIGNIFICANTLY AFFECTING THE ENVIRONMENT SO AS TO REQUIRE AN ENVIRONMENTAL IMPACT STATEMENT UNDER NEPA 42 U.S.C. § 4321 et seq.

On November 7, 1973 the Court permitted the Plaintiffs to amend their complaint to include a violation of the National Environmental Policy Act of 1969 (NEPA).[35]

[33] S.Rep. No. 752, 79th Cong., 1st Sess. 199 (1945).

[34] Subsequent to the adoption of this program, the SBA has waived its exemption under § 553(a). The 1971 set-aside program was adopted August 19, 1971 and the official agreement was signed December 29, 1971. The SBA published its notice of waiver on August 25, 1971. 36 Fed.Reg. 16716-17.

[35] Whether the Plaintiffs have standing to raise the NEPA issues has been the cause of considerable discussion in the parties' papers. The crux of the discussion is whether the Plaintiffs' primary concern with protecting their economic interests rather than tangential environmental interests precludes them from raising the issue. Zlotnick v. Land Development Agency, 2 E.L.R. 20235 (No. 1700-71, D.D.C. March 3, 1972); Clinton Community Hospital v. Southern Maryland Medical Center, 374 F.Supp. 450 (D.Md. 1974); Pizitz v. Volpe, 2 E.L.R. 20378 (No. 3595-N, M.D.Ala. May 1, 1972). No group has a monopoly on advancing the public good. Therefore, any plaintiff who can "arguably" meet the Ballerina Pen standard, *supra*, cannot be denied the right to challenge agency non-compliance with NEPA. The Plaintiffs have alleged an injury in fact, namely, damage to the environment in which they work and upon which

42 U.S.C. § 4321 et seq. The Plaintiffs contend that the set-aside program is a major federal action [36] which "may" have damaging impacts upon the environment in that it may cause the waste of timber resources and possible air and water pollution.[37] Therefore, the Plaintiffs maintain, the Defendants have violated NEPA in failing to file an environmental impact statement as required by Section 4332(C).

NEPA requires each federal agency to file an environmental impact statement if it determines a contemplated program constitutes a major federal action significantly affecting the quality of the human environment. 42

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they depend for their livelihood and continued maintenance of the quality of their lives. This interest is arguably within the zone of interest sought to be protected by this intentionally broad protective statute.

[36] The terms "major federal action" within the meaning of the statute, has an exceptionally broad meaning reflecting the law's intention "to promote an across-the-board adjustment in federal agency decision making so as to make the quality of the environment a concern of every federal agency." Scientists' Inst. for Public Info., Inc. v. A.E.C., 156 U.S.App.D.C. 395, 404, 481 F.2d 1079, 1088 (1973); (see reference to legislative history and judicial interpretations therein). Hanly I applies an objective standard to distinguish between a major and minor federal action such as: cost of the project, the amount of planning preceding it, the time required to complete it, etc. Hanly v. Mitchell, 460 F.2d 640, 644 (2d Cir. 1972) (Hanly I).

[37] The specific impact which the plaintiffs claim is under-utilization of our natural resources. The Plaintiffs' thesis is that larger companies are more capable of using the timber to its full potential because they are better integrated and have financial resources to procure expensive, technologically advanced equipment to achieve the greater integration. The Plaintiffs see any limitation on small business' resale of set-aside timber to large companies as underscoring the under-utilization syndrome.

The Plaintiffs support their argument that small concerns contribute to greater air and water pollution by citing several bills which would have assisted small operations financially to meet new pollution regulation requirements.

U.S.C. § 4332(C). Each agency, then, must make the initial determination regarding the size and effect of the contemplated program upon the environment. The Forest Service decided the set-aside program was not a major federal action affecting the quality of the environment, and, therefore, did not require an environmental impact statement. They did not, however, articulate the reasons for this conclusion until two years after the implementation of the program.[38]

The Court is now presented with the question of whether the agency's threshold decision was arbitrary, capricious or otherwise clearly erroneous. In its review of the agency's decision, the Court is obligated to consider the substantive decision on the merits to see if it is in accord with NEPA's requirements. E.g., Environmental Defense Fund v. Froehlke, 473 F.2d 346 (8th Cir. 1972); Environmental Defense Fund, Inc. v. Corps of Engineers of the United States Army, 470 F.2d 289 (8th Cir. 1972); Committee for Nuclear Responsibility v. Seaborg, 149 U.S.App.D.C. 380, 463 F.2d 783 (1971); Mowry v. Central Electric Power, 5 E.R.C.1978 (D.S.C. Nos. 72-1469 and 73-35, August 1, 1973). The Court's review, however, is a limited one for the purpose of determining whether the agency reached its decision after full, good faith consideration of the environmental factors under the standards set forth in §§ 101 and 102 of NEPA; and whether the actual balance of costs and benefits struck by the agency according to these standards was arbitrary or clearly gave insufficient weight to environmental factors. E.D.F. v. Froehlke, *supra* 473 F.2d at 353.

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[38] On February 5, 1974, the Defendants filed, as a supplemental answer to the Plaintiffs' Interrogatories, an 18 page "Environmental Analysis Report" which sets out the Forest Service's reasons for concluding that this federal action did not require an environmental impact statement.

The Forest Service's environmental report has analyzed each factor the agency is required to examine in drafting an impact statement. See *Forest Service Manual*, Section 8411. The Court has considered both this report and the Plaintiffs' lengthy analysis of the environmental factors and is compelled to conclude that the 1971 set-aside program is neither a major federal action nor one that significantly affects the quality of the human environment. The agency's decision gave good faith consideration to the environmental factors and came to a reasonable conclusion. The 1971 set-aside program is merely a technical change in the earlier set-aside program. It does not change either the manner or volume of timber harvested each year. Nor does it suspend the Forest Service's strict environmental and harvesting regulations for any bidder, large or small. The program simply guarantees small concerns a continued opportunity to bid on the national forests. The question is not whether the tree will fall, but who will fell it.

V. THE SET-ASIDE PROGRAM DOES NOT VIOLATE THE FIFTH AMENDMENT AND OTHER FEDERAL STATUTES

As final points, the Plaintiffs contend that the timber set-aside program violates the Fifth Amendment, the Employment Act of 1946, the Economic Stabilization Act Amendments of 1971 and certain statutory provisions relating to the administration of the national forests. The Court also finds these objectives to be without merit.

Examining first the Plaintiffs' charge regarding a violation of the Fifth Amendment, the Court finds the Plaintiffs have not been deprived of property without just compensation. The Plaintiffs have no vested proprietary right in the government's contracts or property. Gonzalez v. Freeman, 118 U.S.App.D.C. 180, 184, 334

F.2d 570, 574 (1964). The "right" the Plaintiffs do have under the Fifth Amendment is the right to due process. This means that in the event of arbitrary, capricious or illegal administrative action affecting one's opportunity *to bid* on the contracts or property, the party who can show an injury due to allegedly illegal action can bring a suit to set it aside. Scanwell Laboratories, Inc. v. Shaffer, 137 U.S.App.D.C. 371, 424 F.2d 859 (1970). In the instant case, the Court has found that the SBA administrator acted within the bounds of his statutory authority and has devised this program to implement his statutory duty with the Plaintiffs' full participation.

As to the other federal statutes the set-aside program is alleged to have violated, suffice it to say that the Plaintiffs' allegations have no basis in fact, have no basis in law or are not relevant. Despite the two and one-half years the program has been in operation, the Plaintiffs have been unable to produce any evidence that the program defeats the policies of maximum employment or maximum economic productivity as declared in the Employment Act of 1946, 15 U.S.C. § 1021, and the Economic Stabilization Act Amendments of 1971, 15 U.S.C. § 1026(a), respectively. To the contrary, the timber set-aside program appears quite consistent with these national policies in that it is part of the aid to small business which Congress has declared will preserve the freedom of competition basic to the economic well-being and security of this country.[39]

Nor has the Plaintiff been able to offer any proof of violations of the statutes governing the administration of the national forests. The statutes which the Plaintiffs

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[39] Furthermore, employment in this industry is determined by the demand for timber and the volume of logs cut, and not by the size of the concern who does the logging.

claim have been violated are irrelevant to the establishment of timber set-aside sales. Instead, they pertain to forest technology and agriculture.[40] In any event, there

[40] The Plaintiff cites sections which (1) directs the administration of the national forests shall be toward the goal of water control and a continuous timber supply, 16 U.S.C. 475; (2) authorizes the sale of dead, matured or large growth trees, providing it is for the appraised value, to preserve younger growth, 16 U.S.C. 476. The sale of timber to small concerns cannot be at less than the appraised value, 36 C.F.R. 221.7 and 221.8; (3) Sections 16 U.S.C. §§ 528-531 is to supplement the purposes for which the national forests were established as set out in § 475, by adding that the national forests are established and administered for outdoor recreation, range, timber, watershed and wildlife and fish purposes, and that the Secretary of Agriculture is authorized and directed to develop and administer the renewable surface resources of the national forests for multiple use and sustained yield of the several products and services obtained therefrom; and in effectuation of these sections the Secretary is to cooperate with state and local governmental agencies; (4) the Secretary of Agriculture is authorized to conduct technical agricultural experiments and tests, whether alone or in conjunction with private individuals or public agencies which he deems necessary to foster the growth and development of the national forests, 16 U.S.C. 581; (5) recognizes the relationship between the advances in forest technology and forest research efforts conducted by state colleges and universities and the federal government and the realization of full effectiveness if these efforts are conducted in close cooperation, 16 U.S.C. § 582a; and (6) severally authorize the Secretaries of Agriculture and Interior to establish by formal declaration, when in their discretion such action would be in the public interest, cooperative agreements with private landholders for the purpose of developing "cooperative sustained-yield units." 16 U.S.C. 583; (7) authorizes the Secretary of Agriculture to direct all activities with relation to the prevention of soil erosion including surveys and investigations, and various preventive measures, to cooperate with other agencies and persons as he deems necessary and acquire lands whenever necessary for the purposes of the Act, 16 U.S.C. § 590a; (8) declares as national policy that the U.S. government independently and through cooperation with other state and local governments and private timber owners to prevent outbreaks of destructive insects and diseases threatening all forest lands, 16 U.S.C. § 594-1; (9) authorizes the Secretary of Agriculture to cooperate with other agencies as he deems necessary to erradicate white-pine blister rust; to appropriate matching funds for such blister control if on non-federal property; and requires that any blister control program on Indian territory be subject to approval of the agency or Indian tribe with jurisdiction over such lands.

has been no showing, other than Plaintiffs' allegations, that the set-aside program contradicts the general, overall purpose of these statutes—the efficient administration and management of the national forest. The program does not increase the volume of timber harvested. Nor does it relieve any timber bidder from complying with the environmental and harvesting regulations imposed by each contract irrespective of the size of the bidder.

VI. CONCLUSION

At the expense of being repetitive, the Court finds the 1971 set-aside program pertains solely to the opportunity to submit *bids* on a certain percentage of national forest timber *when*, and only when, the timber purchases of small forest products manufacturers has declined more than ten per cent of their historic share of the timber market. The program is small business' bulwark against their shut out from bidding on government timber. It does not reduce large business' historical share of the timber market nor does it increase that of small concerns. It does not increase the volume of logs cut, nor does it cast past harvesting and environmental regulations to the wind. The Defendants have acted within the scope of their authority and have developed, with the Plaintiffs' assistance, a reasonable program to effectuate the Defendants' statutory responsibilities. Since the program is reasonable in substance and in its adoption, the Court will pay due deference to the agencies' expertise in this area. Thus, for the reasons stated above, the Court will grant the Defendants' Motion for Summary Judgment and deny the Plaintiffs' Motion for Summary Judgment. An Order of even date will be entered in accordance with this Opinion.

APPENDIX C

The petitioners herein are:

Duke City Lumber Company
Willamette Industries, Inc.
Georgia-Pacific Corporation
Pope & Talbot, Inc.
Roseburg Lumber Company
Edward Hines Lumber Company
DeGiorgio Corporation
Publishers Paper Company
Medford Corporation
Columbia Plywood Corporation
Cascade Locks Lumber Company

APPENDIX D

The intervenor-defendants herein are:

National Independent Forest Industries Committee
Southeastern Lumber Manufacturers Association
Western Pine Industries, Inc.
Skyline Lumber Co., Inc.
Shearer Lumber Products, Inc.
Bear River Lumber Co., Inc.
Pyramid Mountain Lumber Company
Packwood Mountain Lumber Company
Millway Lumber Company
Umphlett Lumber Company, Inc.
Greensboro Lumber Company
Ocala Lumber Sales Company, Inc.
J. F. White & Sons
Williamson Lumber Company
Bennet Lumber Products, Inc.
Edgerton Lumber Company
Lakeside Lumber Company, Inc.
Loveness Company
Modoc Lumber Company
North Side Lumber Company
S & G Lumber Company, Inc.
Sun Studs, Inc.
Taylor Lumber Company

D2

3-G Lumber Company
Alsea Lumber Company
Alsea Veneer Company
The American Timber Company
Astoria Plywood Corporation
Bear River Lumber Company
Brandt & Wickland Forest Products
C & D Lumber Company
Clark & Powell Lumber Company
Del Conner Lumber, Inc.
D. R. Johnson Lumber Company
Eel River Sawmills, Inc.
Ellingson Lumber Company
Everett Craik Lumber Company
Evergreen Forest Products
F. H. Stoltze Land & Lbr. Company
Fort Hill Lumber Company
Gem State Lumber Company
Hobin Lumber Company, Inc.
Hull-Oakes Lumber Company
Jackson Sawmill, Inc.
J. B. Lumber Company, Inc.
Kennedy-Stevens Lumber Company, Inc.
L. A. Hamilton Lumber Company, Inc.
Moser Lumber Company

D3

Riverside Lumber Company
Seneca Sawmill Company
Standard Plywood Corporation
Star Wood Products
Superior Buildings Company
Twin Harbors Lumber Company
Western States Plywood Cooperative
White Swan Lumber Company, Inc.
Zip O Log Mills, Inc.

APPENDIX E

Forest Service Manual:

2431.12

TITLE 2400—TIMBER MANAGEMENT

2431.11—Small-Business Sale Program Policy. The Department endorses the declared policy of the Congress, as stated in the Small Business Act. (15 U.S.C. 631) Section 2 cites that policy:

> The essence of the American economic system of private enterprise is free competition. Only through full and free competition can free markets, free entry into business, and opportunities for the expression and growth of personal initiative and individual judgment be assured. The preservation and expansion of such competition is basic not only to the economic well-being but to the security of this Nation. Such security and well-being cannot be realized unless the actual and potential capacity of small business is encouraged and developed. It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect insofar as is possible the interests of small business concerns in order to preserve free competitive enterprise, to insure that a fair proportion of the total purchases and contract or subcontracts for property and services for the Government be placed with small business enterprises, to insure that a fair proportion of the total sales of Government property be made to such enterprises, and to maintain and strengthen the overall economy of the Nation.

In furtherance of the policy the Department has entered into an agreement with the Small Business Administration (SBA) (FSM 2431.19) National Forest administrators will cooperate with SBA representatives in meeting the spirit and objectives of the Small Business Act.

The set-aside program, under which timber sales are designated for preferential award to small concerns, is an important tool provided to ensure that an appropriate share of timber sales are made to small business concerns.

2431.12—Definition of Small Business. In connection with the sale of Government-owned timber a small business is a concern that:

—Is primarily engaged in the logging or forest products industry.

—Is independently owned and operated.

—Is not dominant in its field of operation.

—Together with its affiliates, its number of employees does not exceed 500 persons.

In the case of Government sales of timber reserved for or involving preferential award to small businesses, when the Government timber being purchased is to be resold, a concern is a small business when:

—It is a small business within the meaning of the first paragraph of this section.

—It agrees that it will not sell to a concern which is not a small business within the meaning of this paragraph more than 30 percent of such timber or, in the case of timber from certain geographical areas, more

than the percentage established therein for such area. In the case of Government sales reserved for or involving preferential treatment of small business, when the Government timber purchased is not to be resold in the form of saw logs to be manufactured into lumber and timbers, a concern is a small business when:

—It meets the criteria contained in the first paragraph of this section.

—It agrees that in manufacturing lumber or timbers from such saw logs cut from the Government timber, it will do so only with its own facilities or those of concerns that qualify as a small business under the first paragraph of this section.

2431.13—Determination of Size Status. Due to possible mergers and changes in a concerned organization, it is not possible to know the current size status of every prospective bidder. Forest administrators will therefore include a provision for each bidder to self-certify its status on each bid involving a set-aside sale. The certification will be in the form shown in FSM 2431.59.

* * * *

Under SBA regulations the self-certification may be accepted unless there is a protest from another bidder or the contracting officer has reason to believe that there is an error, in which case the size matter will be referred to the SBA for an official determination.

2431.14—Determination of Set-Aside Sales. The Small Business Act specifies that a fair proportion of National Forest timber be made available to small business concerns. In order to meet this requirement, there are two basic questions to be answered. (1) what is the fair proportion of the sales that should go to small business

concerns (FSM 2431.15), and (2) has small business been able to purchase that fair proportion as indicated by analysis procedure outlined in FSM 2431.17?

The definition of small business in regards to sale of Government-owned timber discusses timber in the form of saw logs to be manufactured into lumber and timbers (FSM 2431.12). Therefore, products appraised on other than a board-foot basis, such as pulpwood, posts, and small poles, will normally be excluded from determination of fair proportions. Large poles, piling, etc. that could normally also be classed as saw logs should be included in the fair proportion, however. *-Per acre material sold as a mandatory bid item and shown in MBF on the 2400-17 should be used in base share and current purchase analysis. When this material is an optional removal item it should be discharged in the analysis.-* The fair proportion analysis will be based on a 5-year history and the current purchasing analysis will normally be based on 6-month periods—January 1 through June 30 and July 1 through December 31.

All classes of industry must be informed of the fair proportion of timber that is to be available for purchase by small business. This informs both large and small business firms that when this proportion is not reached a set-aside program will be initiated.

The Small Business Administration may conduct reviews of the small business program in the sale of National Forest timber at field offices of the Forest Service. Due notice of intention to perform such reviews will be given to the field office concerned and a time schedule for the review will be agreed upon by the agencies.

2431.15—Determination of Base Share. The base average share determination for small business shall be for

the 5-year period from January 1, 1966, to December 31, 1970, and shall be reviewed at intervals of not more than 5 years. Any such further reviews shall not reduce the average share below 50 percent of the base (1966-1970). Analysis to determine the base share should be based on a recognizable market area but normally not smaller than a National Forest. Smaller areas may be appropriate, such as when a forest is on both sides of a mountain range or split apart geographically. *-Larger areas which include parts of more than one National Forest may be used, where appropriate, but coordination between the Forests must be adequate to meet time schedules etc.-* Normally market areas will contain not less than two small business concerns. Regional Foresters may issue additional guidelines as determined necessary and should consult the local area representative of SBA. Supervisors may want to also consult with local industry both big and small to determine the market area.

The definition of small business expressed previously will be used by the Forest Supervisor for analysis purposes, but final determinations of the small business status of particular bidders are made only by the SBA in accordance with the full text of its regulations as published in the Code of Federal Regulations (CFR).

For analysis purposes when the Supervisor is uncertain of the small or large classification of an operator, he should place the concern in the category which appears most likely, and request the appropriate district office of the SBA to furnish *-an informal determination. *-After operators are divided into large and small business, compilations should be made for each category.

Purchases by nonmanufacturing firms will not be placed in a special category. Forest Supervisors will make their best determination of where the timber goes, small or large business. A similar procedure will be used in assigning current 6-month purchases. No national certificate or accountability system will be requested, but Regional Foresters may establish one if experience indicates it would be helpful.

*-Some purchasers may have a specialty mill and dispose of only a small portion of their timber sale purchase through their own mills. Examples are loggers who may have a cedar mill, shake plant, or stud mill. Any purchaser who does not have the capacity to manufacture 50 percent or more of his annual log production through his own plant because of timber species, size, etc., should be classed as a nonmanufacturing firm. Volumes will be credited to the size class of the firm where the timber was actually manufactured. A large business pulpmill or chip plant who purchases sales may have some sawtimber included in the purchases. If he has no manufacturing facilities for sawtimber he may dispose of the logs to sawmills. The purchaser, in this instance, should be considered a nonmanufacturing firm and the sawtimber volume credited to the size class of the firm where the sawlogs were manufactured.

Small business firms taken over by large business through purchase, merger, etc., generally third party their sales. When the manufacturing facility remains in operation the volume should be credited to the size class of the third party as of December 31, 1970. There are instances when sales are third partied but no merger, etc., has taken place. It is simply a transfer of sale volume and the original purchaser remains in business

as he was before the sale was third partied. In those instances where the original purchaser and the third party are of different size class the volume should be credited to the size class as the timber was or will be actually manufactured.

The volume purchased by firms which have gone out of business (excluding mergers, consolidations, etc) during the base period-* will be considered as part of the base period history and credited to the size class of the firm when it ceased operations.

In establishing the base average share, the volume of timber purchased by firms whose size status changed from small to large business prior to January 1, 1971, will be counted as large business purchases, while those changing from small to large on or after January 1, 1971, will be counted as small business purchases. A firm's purchases will be counted for the entire 5-year period as either small or large according to the cutoff date of January 1, 1971. Do not use partial allocation for the period when the firm operated as small business and then large. The same date and procedure will also be used for a firm changing from large to small size status.

There may be need for variations in computing the base average share from those indicated by the 1966-1970 base period, such as past long-term sales being completed, large salvage sales, change of land base from Bureau of Indian Affairs to National Forest status.

Approval of a base average share differing from that indicated by actual purchasing history *-in the 1966-1970 period-* will be by the Regional Forester based on recommendations by the Supervisor and SBA. *-Use of other than the 5-year period should be rare.

Base-average-share calculations should be based on sales over $2,000 value. Exceptions can be made to include sales under $2,000 in value when they form a significant portion of the total volume sold for a specific marketing area. In either instance the decision to include or exclude volumes under $2,000 in value should be documented well enough to verify their significance in the total program. Base-average-share percentages should be rounded off to the nearest percent.-*

Small and large business proportions as established *-in the past on-* some forests will not necessarily be preserved. Each area of consideration must be recalculated using the above criteria.

Ordinarily the base average share will be recomputed at 5-year intervals with the next period covering calendar years 1971-1975. In recomputing the base average share during the next 5-year period the same principles shall be used. For example, purchases by a firm changing size status from small to large prior to January 1, 1971, will be counted as a large business and those changing from small to large after that date until the end of the 5-year period will be counted as *-the size class when the sale was purchased.-* However, any average base established by the recomputation must not be less than 50 percent of the base share established for the 1966-1970 base period.

Approval for recomputing the base average share prior to 1975 must be by the Regional Forester.

2431.16—Initiating Required Set-Aside Program. At 6-month intervals, each January and July, the Forest Supervisor will review the purchases during the past period for each marketing area to determine whether a

set-aside program will be required during the current 6-month period. *-Set aside will be required (1) when there is an accumulated volume deficit and small business failed to purchase their base share by 10 or more percentage points of the volume sold in the past 6-month period, or (2) when there is an accumulated volume deficit and small business failed to purchase their base share by an accumulated 10 or more percentage points for consecutive 6-month periods. A volume deficit that occurs within a given 6-month period is considered an accumulated deficit for that period. An accumulated percentage deficit of 10 or more percentage points must be an accumulation of successive deficits.-* When set-aside sales are required by either of the above two situations, the total volume of the cumulative deficiency plus the small business share for the next period will be established as set-aside sales. This immediately returns small business purchase back to their base share. *-Circumstances may occur when it would not be prudent or equitable to make up the entire cumulative deficiency during the next period. In those cases the deficiency may be spread over several periods. The Forest Service and SBA should concur with such a delay.

When a set-aside program is triggered, it may not be practicable to provide the exact volume of deficit and share for the next period sale program because of individual sale volume makeup. Set asides are not required to equal the exact volume needed during the next period. However, it would be better to prepare a set-aside program in excess of needs rather than too small a program.-*

The above provisions do not preclude the Forest Service and SBA from otherwise establishing or eliminating

set-asides which they determine appropriate under the Small Business Act. There may be instances when the required program is or is not triggered, and the SBA and Forest Service agree the analysis is defective for specific reasons. In those instances, upon agreement between field representatives of the two agencies the required program may be initiated or delayed. Any formula system of a triggering device may have exceptions and judgment must then prevail. An example of establishing set-asides although none are required during a 6-month period is when it is obvious the purchasing pattern during the first months of a period has changed whereby small business cannot obtain its share during the period. Set-asides may be established during the latter part of this period. Examples of eliminating set-asides although required by the analysis are when there is no longer any small business in the area, or when there is repeated absence of bidding on set-asides and open sales.

Exceptions to the required procedure may also be allowed in rare circumstances when the normal planned sale program is disrupted because of unusual circumstances, such as numerous sales with extensive road development being offered during the same period, salvage sales because of natural disasters, large volume sales disrupting the normal sale pattern, etc.

There are important elements to consider in individual sale selection for required set-asides.

—Programmed harvest, determined under sustained yield policy, control the level of offerings.

—The Department has a broad concern for industry and community stability. This requires that the Forest

Service be knowledgeable about, and take into consideration, the business and timber supply problems of local forest industry enterprises that draw on National Forest for supply.

—In general, the Department offers timber for sale under conditions that make competition feasible and avoids timber-supply decisions and policies that result in timber allocations to individual companies or specific communities.

—Multiple use consideration in management of the National Forest has a proper place in determining the rate, timing, and size of timber sale offerings. Like sustained-yield considerations, multiple use considerations may limit the volume of timber offered for sale.

There are also important elements to consider in the sale program for a National Forest as related to set-asides.

—A National Forest sale program is prepared to make available the programed annual cut in such size classes, sale terms, and of a quality spectrum designed to meet the range in demand as represented by its purchasers.

—It is essential that sale programs be developed in an orderly manner and announced to the timber industry periodically, well in advance of actual offering. * * *

— Where it is necessary to publish the sale program announcement before it has been decided whether or not a set-aside program is to be triggered for the first 6-months of the 12-month program, the sale announcement should carry a statement such as: "Determination of the need for a set-aside program has not been completed. You will be notified as soon as the determination has been made."-

•— If there is a likelihood that a set-aside program will be triggered, the sales which will be set aside, at least up to the volume of the base share, should be indicated on the sale program announcement by a symbol and the following statement is suggested: "It is likely a set-aside program will be initiated during this period. Those sales marked (*Symbol*) will be a part of this program. You will be notified as to the final sale selection as soon as the determination has been made."

—The sale program announcement for the second 6-months of the 12-month program should also have the possible set-asides indicated by a symbol with an appropriate statement should the program be triggered during this period.-•

2431.17—Analysis Procedure. The first current purchase analysis period will be for calendar year 1971 and on a 6-month period thereafter. Samples of such analysis covering several circumstances are shown in exhibits 1, 2, and 3.

Exhibit 1

SAMPLE ANALYSIS

National Forest
AAC 200 MM
Avg. 6-mo. sales 100
Avg. Small Business share 60%

6-mo. period	Plan sale vol. MM	Vol. sold MM		Small Bus. share MM		Purchases		Small Bus. purchases --share, MM		Test			Set-aside, next period	
		Period	Cum.	Period	Cum.	% Period	% Cum.	Period	Cum.	1 a	1 b	2	Need MM	Vol. MM
1	110	105	105	63	63	57.1	57.1	-3	-3	N	N	Y	N	-
2	95	100	205	60	123	55.0	56.1	-5	-8	N	N	Y	N	-
3	90	90	295	54	177	68.9	60.0	+8	0	N	N	N	N	-
4	115	110	405	66	243	62.7	60.7	+3	+3	N	N	N	N	-
5	110	105	510	63	306	53.3	59.2	-7	-4	N	N	Y	N	-
6	95	90	600	54	360	72.2	61.2	+7	+7	N	N	N	N	-
7	105	105	705	63	423	53.3	60.0	-7	0	N	N	N	N	-
8	95	100	805	60	483	53.0	59.1	-7	-7	N	N	Y	Y	70
9	105	100	905	60	543	70.0	60.3	+10	+3	N	N	N	N	-
10	95	95	1,000	57	600	54.7	59.8	-5	-2*	N	N	Y	N	-

1 No. consecutively for 5-yr. period
2 Announced sale program
3 4 Actual sales
5 6 = 3 and 4 x S.B. %
7 8 Self-explanatory
9 Col. 7 + col. 3
10 Col. 8 + col. 4
11 Col. 7 - col. 5
12 Col. 8 - col. 6
13 Test 1a - col. 9 < 10% difference Yes(X)
14 Test 1b - col. 9 accumulated 10% or
15 Test 2 - Accumulated deficit
16 Yes - if: 13 and 13 or 14 yes No(N)
17 S.B.% x col. 2 + col. 12

*To be carried forward to next 5-yr. period.

Exhibit 2

SAMPLE ANALYSIS

_____National Forest
AAC 200 MM
Avg. 6-mo. sales 100
Avg. Small Business Share 60%

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17
6-mo. period	Plan sale vol. MM	Vol. sold MM		Small Bus. share, MM		Small Bus. Vol. MM		Purchases %		Small Bus. purchases --share, MM		Test 1		Test 2	Set-aside, next period	
		Period	Cum.	Period	Cum.	Period	Cum.	Period	Cum.	Period	Cum.	a	b		Need	Vol. MM
1	110	105	105	63	63	40	40	38.1	38.1	-23	-23	Y	Y	Y	Y	80
2	95	100	205	60	123	84	124	84.0	60.5	+24	+1	N	N	N	N	-
3	90	90	295	54	177	70	194	77.8	65.8	+16	+17	N	N	N	N	-
4	115	110	405	66	243	82	276	74.5	68.1	+16	+33	N	N	N	N	-
5	110	105	510	63	306	50	326	47.6	63.9	-13	+20	Y	N	N	N	-
6	95	90	600	54	360	47	373	52.2	62.2	-7	+13	N	Y	N	N	-
7	105	105	705	63	423	44	417	41.9	59.1	-19	-6	Y	Y	Y	Y	63
8	95	100	805	60	483	70	487	70.0	60.5	+10	+4	N	N	N	N	-
9	105	100	905	60	543	56	543	56.0	60.0	-4	0	N	N	N	N	-
10	95	95	1,000	57	600	40	583	42.1	58.3	-17	-17*	Y	Y	Y	Y	+17

1 No. consecutively for 5-yr. period
2 Announced sale program
3 4 Actual sales
5 6 = 3 and 4 x S.B. %
7 8 Self-explanatory
9 Col. 7 +col. 3
10 Col. 8 +col. 4
11 Col. 7 -col. 5
12 Col. 8 -col. 6

13 Test 1a - col. 9 <10% difference
14 Test 1b - col. 9 accumulated 10%
15 Test 2 - Accumulated deficit
16 Yes - if 15 and 13 or 14 yes
17 S.B.% x col. 2 + col. 12

Yes(Y) or No(N)

*To be carried forward to next 5-yr. period.

Exhibit 3

SAMPLE ANALYSIS

_____National Forest
AAC 200 MM
Avg. 6-mo. sales 100
Avg. Small Business Share 60%

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17
6-mo. period	Plan sale vol. MM	Vol. sold MM		Small Bus. share, MM		Small Bus. Vol. MM		Purchases %		Small Bus. purchases --share, MM		Test 1		Test 2	Set-asides, next period	
		Period	Cum.	Period	Cum.	Period	Cum.	Period	Cum.	Period	Cum.	a	b		Need	Vol. MM
1	110	105	105	63	63	50	50	47.6	47.6	-13	-13	Y	Y	Y	Y	70
2	95	100	205	60	123	74	124	74.0	60.5	+14	+1	N	N	N	N	-
3	90	90	295	54	177	43	167	47.8	56.6	+11	-10	Y	N	Y	Y	79
4	115	110	405	66	243	48	245	70.9	60.5	+12	+2	N	N	N	N	-
5	110	105	510	63	306	54	299	51.4	58.6	-9	-7	N	N	Y	N	-
6	95	90	600	54	360	48	347	53.3	57.8	-6	-13	N	Y	Y	Y	76
7	105	105	705	63	423	78	425	74.3	60.3	+15	+2	N	N	N	N	-
8	95	100	805	60	483	56	481	56.0	59.8	-4	-2	N	N	Y	N	-
9	105	100	908	60	543	56	537	56.0	59.3	-4	-6	N	N	Y	N	-
10	95	95	1,000	57	600	53	590	55.8	59.0	-4	-10	N	Y	Y	Y	+10

1 No. consecutively for 5-yr. period
2 Announced sale program
3 4 Actual sales
5 6 = 3 and 4 x S.B.%
7 8 Self-explanatory
9 Col. 7 + col. 3
10 Col. 8 + col. 4
11 Col. 7 - col. 5
12 Col. 8 - col. 6

13 Test 1a - col. 9 <10% difference
14 Test 1b - col. 9 accumulated 10%
15 Test 2 - Accumulated deficit
16 Yes - if 15 and 13 or 14 yes
17 S.B.% x col. 2 + col. 12

Yes(Y) or No(N)

*To be carried forward to next 5-yr. period.

In this analysis procedure not-set-aside sales purchased by firms not owning manufacturing facilities will be placed in the large or small business category. The Forest Supervisor will make his best determination of where the timber will go for manufacture.

Set-aside sales not bid on by small business and sold without readvertisement will be counted as contributing toward meeting the base share for small business. This ensures orderly sale of timber in the event that small business firms did not require the set-aside timber as indicated by absence of bidding. Set-asides will not be increased later by these volumes in which small business was not interested.

2431.18—Scheduling and Processing Set-Asides. The Forest Supervisor will afford the SBA an opportunity to review the proposed sale program. The SBA has agreed to consider the need of forest management and other pertinent factors involved in such program. SBA will review the sale program with the Forest Supervisor to ensure consistency with the spirit and intent of the Small Business Act.

Upon reaching agreement on the above-listed considerations, plus any additional items which the Supervisor considers pertinent to specific areas, these criteria will be used in formulating programs for specific set-aside sales. Such programs will then be confirmed between the Forest Service and SBA using SBA form 441, Joint Set-Aside for Small Business. *-It is permissible on a triggered program to list all set-asides on one form 441 for the next 6-month period for approval by the Forest Supervisor and SBA. An individual form 441 is not required for each set-aside.-*

The bidding system for set-asides will be the same as on non-set-asides. That is, the local criteria used in deciding upon method of bidding will be followed whether or not a given sale is a set-aside.

After it has been determined that a set-aside program is warranted *-and that program has been announced there may be a request for change of individual sale selection. Ordinarily such changes should be established by the following procedure:-*

—The SBA, after consultation with the Forest Supervisor, will submit SBA form 441 to the Forest Supervisor.

—Set-aside may be declined only on grounds of program requirements, as specified in the current interagency agreement which will be specifically stated in sufficient detail to clearly show the applicability of the reason to the case under consideration. For example, general terms, such as "silviculture," "forest protection," and "forest management," will be accompanied by specifics which will include a statement as to why small business cannot meet the requirements of the sale.

—If the Forest Supervisor rejects the set-aside request upon such grounds, SBA will have 10 working days from receipt of form 441 to apply for review by the appropriate Regional Forester.

—The Regional Forester may make a determination in favor of a set-aside or he may reject the request of SBA on the same basis as rejection by Forest Supervisor. If the reconsideration is rejected, SBA will have 20 working days from the date of receipt of the form 441 to seek reconsideration by the Secretary of Agriculture.

—Failure of SBA to seek reconsideration within the allotted times will be assumed to indicate acceptance of a ruling. A decision not to seek reconsideration shall be communicated immediately to the Forest Service as will initiation of further reconsideration.

If conditions change so that the Forest Supervisor no longer considers it advisable to retain the status of an approved set-aside, he should request the SBA to concur in a withdrawal. This should be done by making slight changes in SBA form 441. After completely filling out the heading of SBA form 441, including sale number or designation in section 1, strike out printed word "is" and in lieu thereof insert "is not". Then clearly state reasons for withdrawal in space in section 1 and sign as contracting officer. Forward original and three copies to SBA representative. If SBA representative agrees to withdrawal, he will sign in section 1 and return one executed copy to the Forest Supervisor. If SBA representative disagrees he will make appropriate changes in printed section 2, insert his reasons, and sign. The SBA representative will forward appropriate number of copies to SBA regional office for review.

If the SBA regional office agrees to withdrawal, the Regional Forester will forward one copy to Supervisor. If SBA upholds the rejection of their representative, the Regional Forester will investigate, consult if necessary with SBA, and arrive at the decision whether to seek further reconsideration or let set-aside status stand. In the event of appeal, copies of all forms and correspondence should be forwarded promptly to the Washington Office. Advertisement of such a sale without preferential award will be withheld until the Washington Office informs of the outcome of the dispute.

The SBA representative will furnish SBA form 441 on request. In the event that they are not available, withdrawal can be requested by letter. In such cases, be sure that complete designation to identify and reasons for withdrawal are given.

*-2431.19—*Small Business Agreement of December 29, 1971*

AGREEMENT BETWEEN DEPARTMENT OF AGRICULTURE AND THE SMALL BUSINESS ADMINISTRATION FOR THE DEVELOPMENT AND OPERATION OF A SMALL BUSINESS PROGRAM IN THE SALE OF NATIONAL FOREST TIMBER AND RELATED FOREST PRODUCTS

1. In order to fulfill their mutual responsibilities under the Small Business Act (15 USC 631 *et seq*), the Department of Agriculture (USDA) and the Small Business Administration (SBA) have entered into this agreement for administration of a small business program in the sale of National Forest timber. This agreement supersedes the agreement of 1958-1959 as amended in 1966.

2. USDA, in developing sale programs suitable for bidding by small business firms, will consult SBA and give full consideration to information, advice, and requests of SBA.

3. SBA, in the operation of its various programs designed to assist small business, will consult USDA on matters involving the forest products industry and will give full consideration to information, advice, and requests of USDA.

4. USDA and SBA agree that administration of the National Forest sale program for small business will include the use of the authority of section 15 of the Small Business Act to provide for award of sales set aside for small business when consistent with the purposes established under the Acts respecting the sale of National Forest timber. The program for set-asides will be based on the following:

   a. A base average share for small business shall be established for each National Forest, or significant marketing area, by comparing the small business purchases to total sales therefrom for a 5-year period. The base shall be recomputed on a 5-year history, ordinarily at 5-year intervals, provided that the recomputed base shall not be less than half the initial base share. Recomputation will be based on size of the firm at the time of each timber purchase during the computation period.

   b. Small business will be assured its base average share is available by the application of set-asides. Standards for the initiating of set-asides will be established to achieve this purpose. Set-aside sales not bid on by small business, however, and sold without readvertisement, will be counted toward meeting the base share for small business.

   c. The above provisions do not preclude USDA and SBA from taking other factors into consideration in specific cases when computing base average share, nor from otherwise establishing or eliminating set-asides which they deem appropriate under the Small Business Act.

*-

USDA and SBA may make allowance for such factors as past long-term sales, large salvage sales, or other unusual considerations, when computing the base average share.

5. USDA will afford SBA the opportunity to review prior to public announcement all proposed sale programs involving sales with an estimated value of $2,000 or more, including set-asides proposed by USDA. SBA will then concur in proposed set-asides or will make recommendations for other set-aside action. If such action is not contrary to the purposes established under the Acts respecting the sale of National Forest timber, USDA will make the set-aside. If the representatives are unable to agree on specific set-asides, they will document their respective views for referral to higher authority within the two agencies. In accordance with the Small Business Act, the Secretary of Agriculture has authority to make the final determination.

6. If a set-aside has been programmed, and subsequent events indicate the action is not in the public interest, USDA may request SBA to concur in withdrawal of the set-aside. Upon such concurrence, the set-aside will be withdrawn. If SBA does not concur, the procedures for resolution and referral, developed to implement item 5 above, will be utilized. Similarly, SBA may request USDA to program set-asides in addition or substitution to those agreed upon in the annual program.

7. SBA may conduct reviews of the small business program in the sale of National Forest timber at field

offices of USDA. Due notice of intention to perform such reviews will be given to the field office concerned and a time schedule for the review will be agreed upon by the agencies.

8. A small business which might otherwise be awarded a contract will not be disqualified on the grounds of lack of capacity or credit, but will be referred to SBA for processing of Certificate of Competency, in accordance with section 8(b)(7) of the Small Business Act. In such cases, USDA will provide to SBA all pertinent available information regarding the company and sale in question. SBA will act promptly on the case and submit a decision to USDA within 15 working days. USDA will defer further action on the case until a decision is provided.

9. A concern, to be eligible for award of a set-aside sale, must self-certify that it qualifies as a small business enterprise, as defined by SBA. In the event of a size protest by the contracting officer or other interested party, SBA will determine whether the concern which certified itself as small is, in fact, a small business under the applicable size standard. Appeals from such determinations may be taken to SBA Size Appeals Board. Should USDA develop or obtain information indicating that size certification requirements have been violated, USDA will report such information to SBA.

*-

3

10. Details of operational procedures for accomplishment of this agreement will be developed jointly by designated representatives of USDA and SBA to assure

mutual compatibility of Agency directives on this subject.

/s/ Clarence D. Palmby
Assistant Secretary
Department of Agriculture

12/29/71
Date

/s/ Thomas S. Kleppe
Administrator
Small Business Administration

12/29/71
Date

Small Business Administration Size Standards:

13 C.F.R. § 121.3-9 Definition of small business for sales of Government property

In the submission of a bid or proposal for the purchase of Government-owned property, a concern which meets the criteria provided in this section may represent that it is a small business. In the absence of a written protest or other information which would cause him to question the veracity of the self-certification, the contracting officer shall accept the self-certification at face value for the particular sale involved.

• • • •

(b) *Sales of Government-owned timber.* (1) In connection with sale of Government-owned timber a small business is a concern that:

(i) Is primarily engaged in the logging or forest products industry;

(ii) Is independently owned and operated;

(iii) Is not dominant in its field of operation; and

(iv) Together with its affiliates, its number of employees does not exceed 500 persons.

(2) In the case of Government sales of timber reserved for or involving preferential treatment of small businesses, when the Government timber being purchased is to be resold, a concern is a small business when:

(i) It is a small business within the meaning of subparagraph (1) of this paragraph, and

(ii) It agrees that it will not sell to a concern which is not a small business within the meaning of this paragraph more than thirty percent (30%) of such timber or, in the case of timber from certain geographical areas set forth in Schedule E of this part, more than the percentage established therein for such area.

No. 76-481

In the Supreme Court of the United States

OCTOBER TERM, 1976

DUKE CITY LUMBER CO., ET AL., PETITIONERS

v.

JOHN A. KNEBEL, SECRETARY OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is reported at 539 F. 2d 220. The opinion of the district court (Pet. App. B1-B23) is reported at 382 F. Supp. 362.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 1976. The petition for a writ of certiorari was filed on October 4, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the 1971 Federal Timber Sales Set-Aside Program adopted by the Small Business Administration and the Department of Agriculture, establishing a bidding

preference for small businesses in the sale of a portion of the timber in national forests, is reasonably related to the Small Business Act's provision "that a fair proportion of the total sales of Government property be made to small-business concerns."

2. Whether the Federal Timber Sales Set-Aside Program was adopted in violation of the Administrative Procedure Act.

STATUTE AND REGULATION INVOLVED

1. Section 2[2] of the Small Business Act, 72 Stat. 384, as amended, 15 U.S.C. 631, provides in pertinent part:

> (a) The essence of the American economic system of private enterprise is free competition. Only through full and free competition can free markets, free entry into business, and opportunities for the expression and growth of personal initiative and individual judgment be assured. The preservation and expansion of such competition is basic not only to the economic well-being but to the security of this Nation. Such security and well-being cannot be realized unless the actual and potential capacity of small business is encouraged and developed. It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns in order to preserve free competitive enterprise, to insure that a fair proportion of the total purchases and contracts or subcontracts for property and services for the Government (including but not limited to contracts or subcontracts for maintenance, repair, and construction) be placed with small-business enterprises, to insure that a fair proportion of the total sales of Government property be made to such enterprises, and to maintain and strengthen the overall economy of the Nation.

Section 2[15] of the Small Business Act, 72 Stat. 395, 15 U.S.C. 644, provides:

> To effectuate the purposes of this chapter, small-business concerns within the meaning of this chapter shall receive any award or contract or any part thereof, and be awarded any contract for the sale of Government property, as to which it is determined by the Administration and the contracting procurement or disposal agency (1) to be in the interest of maintaining or mobilizing the Nation's full productive capacity, (2) to be in the interest of war or national defense programs, (3) to be in the interest of assuring that a fair proportion of the total purchases and contracts for property and services for the Government are placed with small-business concerns, or (4) to be in the interest of assuring that a fair proportion of the total sales of Government property be made to small-business concerns; but nothing contained in this chapter shall be construed to change any preferences or priorities established by law with respect to the sale of electrical power or other property by the Government or any agency thereof. These determinations may be made for individual awards or contracts or for classes of awards or contracts. Whenever the Administration and the contracting procurement agency fail to agree, the matter shall be submitted for determination to the Secretary or the head of the appropriate department or agency by the Administrator.

Section 2[5] of the Small Business Act, 72 Stat. 385-387, as amended, 15 U.S.C. 634, provides in pertinent part:

> (b) In the performance of, and with respect to, the functions, powers, and duties vested in him by this chapter the Administrator may—

* * * * *

(6) makes such rules and regulations as he deems necessary to carry out the authority vested in him by or pursuant to this chapter;

Section 2[10] of the Small Business Act, 72 Stat. 393-394, as amended, 15 U.S.C. 639, provides in pertinent part:

(f) * * * When requested by the Administrator, each department and agency of the Federal Government shall consult and cooperate with the Administration in the formulation by such department or agency of policies affecting small-business concerns, in order to insure that small business interests will be recognized, protected, and preserved. * * *

2. 13 C.F.R. 121.3-9 provides in pertinent part:

(b) Sales of Government-owned timber. (1) In connection with sale of Government-owned timber, a small business is a concern that:

(i) Is primarily engaged in the logging or forest products industry;

(ii) Is independently owned and operated;

(iii) Is not dominant in its field of operation; and

(iv) Together with its affiliates, its number of employees does not exceed 500 persons.

STATEMENT

1. The Small Business Act declares that it is national policy "in order to preserve free competitive enterprise, * * * to insure that a fair proportion of the total sales of Government property be made to [small-business concerns] * * * ." Section 2[2](a), 15 U.S.C. 631(a). To effectuate this policy the Act requires that small business

concerns "be awarded any contract for the sale of Government property, as to which it is determined by the [Small Business] Administration and the * * * disposal agency * * * to be in the interest of assuring that a fair proportion of the total sales of Government property be made to small-business concerns * * * . These determinations may be made * * * for classes of awards or contracts." Section 2[15], 15 U.S.C. 644.

Pursuant to this statutory authority, in 1971, the Small Business Administration and the Department of Agriculture Forest Service agreed to replace a 1958 agreement setting aside national forest timber for sale to small business with a revised program (Pet. App. E19-E23). The agencies concluded that the new program would better serve to ensure that a "fair proportion" of the total sales of government-owned timber be made to small business concerns. "Small business concern" was defined in the 1971 program as any business concern primarily engaged in the forest products industry which is independently owned and operated, not dominant in its field of operation, and having no more than 500 employees. 13 C.F.R. 121.3-9(b).

In general, national forest timber is sold through open competitive bidding to all interested concerns. To provide both small and large business concerns with an equitable opportunity to compete, the agencies utilized historical purchases of national forest timber as the measure of "fair proportion." Under this approach, they determined that a "fair proportion" should be the average federal timber sales to small businesses in any timber marketing area in the preceding five-year "base" period, 1966 through 1970 ("base average share") (see

Pet. App. B5. E4-E5).[1] Whenever, in any six-month period, the sales to small business concerns of national forest timber in a particular marketing area fall ten percent below the base average share, a "set-aside" sale is held.[2] The amount of timber "set aside" for sale to small business equals the total volume of the cumulative deficiency plus the base average share for the period (Pet. App. E8-E9). In set-aside sales, the bids of small business concerns are opened first. Set-aside timber that small business concerns fail to purchase may be sold to large concerns but is counted toward the small business base average share (Pet. App. E6, E16). The base average share is recomputed every five years but may not be reduced to less then one-half of the 1966-1970 base period (Pet. App. B4-B7).

The original 1958 program had required the Forest Service to set aside timber for preferential bidding by small business only when a "need" was shown (Pet. App. B3). The Small Business Administration and the Department of Agriculture revised the program in 1971 because the 1958 program was not working and participation by small business in the forest products industry was declining. While small businesses had purchased 75 percent of national forest timber sold in 1958 in several forest regions of the nation, they purchased only 44 percent during the 1966-1970 period (Pet. App. B3-B4 n. 5). It became clear to the two agencies that the

---

[1]Details of the program were set forth in revisions to the Forest Service Manual (Pet. App. E1-E19).

[2]"Had small business purchased a volume of timber above this trigger point but below the base period percentage, there would be no set-aside sale in the following six months. Any surplus above the small business share is carried over from period to period to offset any deficit. Likewise, any deficiency less than 10 per cent is carried over from period to period until the accumulated deficit reaches 10 per cent at which point the set-aside program is triggered" (Pet. App. B5-B6).

1958 program was not effectively ensuring that a fair proportion of the sales of national forest timber be made available to small business concerns (Pet. App. B3-B4).

Accordingly, after extensive consultation with representatives of both small businesses and large businesses in the forest products industry (Pet. 5-6; Pet. App. B14-B16), the Small Business Administration and the Department of Agriculture in 1971 adopted the revised program described above, concluding that it would be "an important tool * * * to ensure that an appropriate share of [national forest] timber sales are made to small business concerns" (Pet. App. E2).

During the first 2 1/2 years of the 1971 program's implementation, less than 6 percent of national forest timber sold was purchased at set-aside sales (Pet. App. B7).

2. Petitioners are eleven large businesses in the forest products industry (Pet. App. C1). In 1972 they instituted this suit in the United States District Court for the District of Columbia for declaratory and injunctive relief. They alleged that the revised set-aside program was invalid under the Small Business Act, had no rational basis, and was procedurally defective under the Administrative Procedure Act (Pet. App. B2 and n. 3). The district court, after determining that petitioners had standing (Pet. App. B7-B10), rejected these arguments in a comprehensive opinion (Pet. App. B1-B23).

The court held that the program had a rational basis and was within the authority of the Small Business Administrator (Pet. App. B10-B14) as a "reasonable, precise yet flexible, means of insuring that small businesses receive 'a fair proportion' of government timber sales" (Pet. App. B13), which "does not reduce large

business' historical share of the timber market nor does it increase that of small concerns" (Pet. App. B23).

In addition, the court held that the notice and hearing requirements of the Administrative Procedure Act were inapplicable because the program involves matters relating to government property or contracts specifically exempted from such requirements by 5 U.S.C. 553(b)(2). The court concluded that, in any event, petitioners had suffered no prejudice because they had actual notice of the proposals for revision of the 1958 set-aside program and actively participated in the development of the 1971 program (Pet. App. B15-B16).[3]

The court of appeals affirmed *per curiam* (except that it held petitioners' challenge to a minor aspect of the 1971 program, the bar against reducing the base average share below 50 percent of the 1966-1970 period, to be not ripe for adjudication) (Pet. App. A1-A3).

ARGUMENT

Petitioners contend that the 1971 Federal Timber Sales Set-Aside Program established by agreement between the Department of Agriculture and the Small Business Administration is in excess of authority conferred by the Small Business Act, lacks a rational basis, and was adopted in violation of the Administrative Procedure Act. These

[3]The court also rejected petitioners' contentions, not raised here, that the program required an environmental impact statement (Pet. App. B17-B20), and that it denied them substantive due process and violated Section 2 of the Employment Act of 1946, 60 Stat. 23, 15 U.S.C. 1021, and Section 4(a) of the Economic Stabilization Act Amendments of 1971, 85 Stat. 753, 15 U.S.C. (Supp. III) 1026(a) (since repealed), and statutes governing the national forests (Pet. App. B20-B22).

contentions were correctly rejected by the courts below and do not warrant further review.[4]

1. a. The district court correctly determined that the 1971 Federal Timber Sales Set-Aside Program furthers the express statutory objective, in Section 2[15] of the Small Business Act, 15 U.S.C. 644, of ensuring that a "fair proportion" of federal property sales be made to small businesses. As the district court observed: "The ratio of timber sales which the program seeks to preserve is based upon the competitive history within the industry. Small business is guaranteed no more than an opportunity to bid on that proportion of the market which it has purchased in the past" (Pet. App. B13). Congress determined that by reserving such opportunities for small business, its purpose of preserving free markets, free entry into business, and opportunities for personal initiative could be realized. See 15 U.S.C. 631. The set-aside program is thus "' reasonably related to the purposes of the enabling legislation.'" *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 369.

[4]There is, moreover, considerable doubt as to petitioners' standing here. Petitioners' claim of standing is based upon their status as future purchasers of national forest timber. As the district court recognized, however, they "have no vested proprietary right in the government's contracts or property" (Pet. App. B20). The Small Business Act, upon which they principally rely in this Court, does not contain any provisions within whose zone of protection petitioners' claims arguably fall. To the contrary its provisions for setting aside a fair proportion of government contracts for small business confer "no enforceable rights upon prospective bidders." *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 126 (footnote omitted). In consequence, petitioners cannot claim standing as persons "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute * * *." 5 U.S.C. 702.

Petitioners' contention (Pet. 11-16) that the 1971 set-aside program serves "to regulate competition," rather than to insure small businesses a fair proportion of federal timber sales, is addressed to the wrong forum. Congress determined that "to preserve free competitive enterprise" (15 U.S.C. 631(a)), small business concerns "shall receive" a fair proportion of government contracts. 15 U.S.C. 644. The 1971 timber sales set-aside program served to advance that objective, as the district court found, without either reducing large business' historic share or increasing the share of smaller concerns (Pet. App. B23). To the extent that establishment of any system of preferential bidding for small business regulates competition for the purchase of timber, such regulation is both permitted and intended by Congress.[5]

b. Petitioners assert (Pet. 16-18) that the program lacks a rational basis because, they contend, there is no factual data showing a decline in small business's share of timber sales. The statistics do show a decline, however, as the district court found (Pet. App. B3-B4, n. 5, B12). But the program is consistent with the Act, whether or not there had been a decline in sales to small businesses. Congress itself determined that small concerns were to be granted a fair proportion of the government's business, and the 1971 program effectuates that legislative objective for the future irrespective of whether

[5]Such a system of preferential bidding does not "freeze" the structure of the forest products industry in perpetuity. It simply implements the policy of the Small Business Act to prevent large firms from excluding small firms from the market place. Moreover, the plan's provision for recomputation of small business' base average share every five years assures that industry structure will remain responsive to long-term market conditions.

small business' share of federal timber sales had been declining in the past (see Pet. App. B12).[6]

2. Petitioners incorrectly contend (Pet. 18-21) that in adopting the 1971 set-aside program the Small Business Administration and the Forest Service failed to comply with the Administrative Procedure Act. The requirement of publication of proposed rulemaking in the Federal Register does not apply to matters relating to public property or contracts (5 U.S.C. 553(a)(2)), and does not apply where the persons subject to the rules "have actual notice thereof in accordance with law." 5 U.S.C. 553(b). Petitioners had actual notice of the proposed program and they participated in the proceedings leading to the adoption of the program and submitted their own data, views, and arguments (see Pet. App. B15, nn. 27, 28, 29). Thus, as the district court found (Pet. App. B15-B16), petitioners have suffered no prejudice or disadvantage, and the requirement of publication did not apply as to them.[7]

[6]A showing of specific need was required under the 1958 set-aside program, and that was one of the deficiencies of that program (see Pet. App. B4 and n. 7).

[7]Since the requirement by its own terms did not apply, it is irrelevant whether, as petitioners claim (Pet. 20), the public property exemption had been waived by the affected agencies. Cf. *Rodway* v. *United States Department of Agriculture*, 514 F. 2d 809, 814 (C.A. D.C.).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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